Supreme Court, U.S.
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No. 08-535

IN THE
SUPREME COURT OF THE UNITED STATES

Chandrakant Pansé, et al., *Petitioners*,

v.

Lindsay Norman, et al., *Respondents*

On Petition for Writ of Certiorari to
The United States Court of Appeals
for the First Circuit

Petition for Writ of Certiorari

Chandrakant Pansé, *J.D.*
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QUESTIONS PRESENTED

I. Whether the constitutionally mandated pre-deprivation due process, in termination of a tenured professor's protected interests in state employment, stands denied where a quasi-adjudicator is not neutral, being a party opponent in ongoing litigation for retaliation for that employee's exercise of Free Speech Clause, or on account of having declared prior to any hearing the decision to terminate that protected employment.

II. Whether denial of timely post-deprivation due process upon termination of protected property or liberty interests can meet constitutional muster.

III. Whether the substantive component of the Due Process Clause protects even if procedural due process is provided in unfounded deprivation of protected property or liberty interests.

IV. Whether the Full Faith and Credit Clause applies to a court's threshold ruling on a question of law, which found retaliation in violation of the Free Speech Clause.

V. Whether Congress has expressly provided judicial remedies for violations of Civil Rights as distinct from state law arbitral cures.

VI. Whether a parent has standing to sue *pro se* on behalf of her or his minor child.

Parties

Chandrakant Pansé, *J.D.*, and

Two Minors, through their father and best friend Chandrakant Pansé,

Plaintiffs-Appellants and Petitioners,

v.

Lindsay Norman,

Paula Gastenveld,

Laurie Taylor,

Ghazi Darkazalli,

Thomas Sabbagh,

Judith Gill,

Peter Tsaffaras, *Esq.*,

Mitt Romney, *Esq.*,

Andrew Scibelli, and

Haidee Morris, *Esq.*,

each personally and in his or her official capacity,

and

The Board of Trustees of Massachusetts Bay Community College ("MBCC,") a State college,

The Board of Higher Education (Massachusetts) ("BHE,") and

The Commissioner of Division of Unemployment Insurance of Massachusetts,

Defendants-Appellees and Respondents

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Citations to Opinions and Orders In This Case:
None.

JURISDICTION

Statement pursuant to Rule 14(1)(e):

(i) The Order sought to be reviewed here was entered by the United States Courts of Appeals for the First Circuit on June 12, 2008. Appendix at ("App:") 1.

(iv) This Court has jurisdiction under 28 U.S.C. § 1254(1).

Statement pursuant to Rule 14(1)(g)(ii):

The U.S. District Court, D. Mass., had subject matter jurisdiction under 28 U.S.C. § 1331, on the basis of petitioner's claims under the Fourteenth and the incorporated First and Fifth Amendments; 42 U.S.C. §§ 1983, 1988; etc. App:28-29. Venue and personal jurisdictions existed as acts herein were committed in Massachusetts, in the course of each respondent being an agent of the State. App:29. Supplemental jurisdiction was claimed under 28 U.S.C. § 1367(a). *Id.*

The U.S. Courts of Appeals for the First Circuit had jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

Introduction

Numerous compelling questions regarding critical protections under the Free Speech Clause and the Due Process Clause, and federal civil rights laws, are raised in this case of severe harms caused by raw abuses of governmental power.

These abuses were perpetrated against two dedicated and exemplary tenured public servants, Professor Chandrakant Pansé, *M.Sc.*, *M.A.*, *Ph.D.*, *J.D.*[1] ("Pansé" or "petitioner,") being one (Bruce Jackson, *Ph.D.*,[2] being the other.)

The respondents terminated the protected employments of both, ignoring a written Civil Rights warning under 34 C.F.R. § 100.7(e) (App:68,) as well as adjudication in progress for retaliation for exercise of the Free Speech Clause. The due process allegedly provided, both pre- and post-deprivation, could not possibly come close to being constitutional under the holdings of this Court. Nor could denial of civil rights, as provided expressly by the Congress of the United States, be justified.

This caused harms of extreme severity, as has been warned repeatedly by this Court (*see*, below, at 13,) warranting a review by this Court.

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[1] graduated from an ABA-accredited law school, May 2008; candidate at the July 2008 bar examination.

[2] U.S. Court of Appeals for the First Circuit, No. 07-2382.

This matter is before this Court for review of the irreconcilability of the holdings of the courts below in granting respondents' motion to dismiss (Fed. R. Civ. Proc. 12(b)(6),) and for summary judgment (Rule 56.)

FACTS

The Pansés present a summary of facts from their *Verified* (App:48) Complaint and from Affidavits opposing motions for summary judgments. App:25-48, 55-64.[3]

1. Pansé has been employed at MBCC since 1993. App:28. Respondents Board of Higher Education ("BHE,") and the Board of Trustees ("Trustees") of the Massachusetts Bay Community College ("MBCC,") are both 'employer' under a collective bargaining agreement ("CBA.") App:26. However, Pansé's paychecks always bore the signature(s) of the then State Treasurer, an elected constitutional officer of the State.[4] *Id.*

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[3] Respondents have not disputed these facts, except where specifically so identified here.

[4] The College forwards all tuition collected from the students to the State. Only the BHE negotiates the CBA with a state-wide faculty union, encompassing all fifteen community colleges in the State. Appropriations from the State Legislature provide for salaries and other expenses at each of these colleges. Local Trustees must vote and approve each college president's local expenditures and hiring/firing decisions. *Cf.*, n. 14, *infra* (BHE is the employer.)

2. Under the CBA, a college president, after conducting a hearing at the college, had the authority to *recommend* the termination of a protected employee (emphasis added.) App:52 (Art. 15.02, 2.) At MBCC, a decision of dismissal required ratification by a vote of the MBCC Trustees, under these Trustee's own Bylaws, with no provision to circumvent that vote. Then to follow was a hearing "on appeal" to the true employer, the (then) BHE Chancellor and a member of the Governor's cabinet, respondent Judith Gill. App:35, 53-54.

3. Beginning in 1993, Jackson and Pansé created a program in the critical field of biotechnology ("biotech,") and built a record in educating non-traditional students (single mothers of all races, inner-city poor, etc.) in a two-year college setting, achieving significant successes. App:29-30, 56, 61.[5] This program included research courses in different biotech fields, which accounted partly for its success. *Id.*

4. The State and State officials (collectively "State" for brevity, all respondent individuals having been indemnified, and being represented, by the State,) knew of, and approved of, these novel ways of teaching biotech via research. App:56-57, 61.

5. An evaluation by National Science Foundation ("NSF,") a Federal agency, praised this program as a model to be emulated nationally. App:29-30.

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[5] The State's response in the federal courts below to such dedicated efforts and successes has been to ridicule Pansé with *ad hominem* attacks.

6. Jackson and Pansé, on their own individual initiatives, competed for and won NSF funds to educate non-traditional students.[6] App:30.

7. Pansé has been outspoken about the need for raising standards of science education at two-year colleges and about not misleading taxpayers as to the lax standards at these schools. App:31, 57, 62.

8. In 1999, MBCC denied tenure to Pansé; he sued in State court, alleging, *inter alia*, retaliation in violation of Free Speech. App:28-29, 64. The State indemnified individual defendants and represented them, making the State the defendant in interest.[7, 8] The Superior Court, denying in part a motion to dismiss, ruled that Pansé had been retaliated against in violation of his Free Speech rights.[9, 10]

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[6] Research Opportunities for Minorities Program (ROMP) grant, there being very few such students in sciences and technologies.

[7] *See*, App:17-18(Docket); 19-20 (Counts Five and Six, Free Speech claims, of the Superior Court Complaint.)

[8] The State then granted tenure to Pansé. App:28-29.

[9] *See*, App:17 (Court Order denying defendant's motion to dismiss the Free Speech counts, Counts 5, 6.) In Fall 2002, the State sought discovery after expiration of repeatedly extended deadlines; the State then entered "Reapplications" for dismissal pursuant to Mass. R. Civ. Proc. 33(a) (App:18.)
In 2003, the Court, without a hearing, denied Pansé's motion for removal of the reapplications and imposed the impermissible penalty of dismissal of the action. *Id.*

[10] In argument in the District Court below, the State ridiculed Pansé's protected speech as "self-serving," thereby attacking

9. In 2001, Jackson filed a complaint with the U.S. Department of Education's Office for Civil Rights ("OCR") for the College's refusal to accept and administer the NSF funds. App:31-32, 55, 60.

10. Pursuant to 34 C.F.R. § 100.7(e) (App:68,) OCR issued a written warning to the State to not retaliate against or intimidate personnel associated with the NSF grant, and to prevent hostile actions against them. App:27, 55, 60. Pansé was covered by this warning and fully cooperated with an ensuing federal investigation of MBCC. App:31-32, 55, 60.

11. Respondent Lindsay Norman, then the new MBCC President, told Pansé that Norman was displeased with Pansé's exercise protected speech and that Norman was watching Pansé. App:55, 60.[11]

12. In Spring 2002, respondent MBCC officials Ghazi Darkazalli, Paula Gastenveld, and Thomas Sebbagh, with the assistance of respondent Laurie Taylor, exploited some student discontent and determined that Pansé's State-approved teaching methods in *one* biotech course to be deficient. App:32-33. A recommendation to Norman to dismiss Pansé' followed. App:33.

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these rulings of the State's own Superior Court.

[11] The State filed an Affidavit in support of its motion for summary judgment, but did not avail of that opportunity to deny this critical fact while challenging Pansé's claims under the Free Speech Clause.

13. Pansé had taught many courses in chemical and biological fields, other than biotech research, regarding which the State never had any concerns whatsoever. App:34, 56, 61.

14. In a letter dated June 2, 2002, Norman wrote to Gill that Norman and the other MBCC officials together had determined that two tenured professors, "one a black and the other Indian," had failed in their teaching duties, and that the College was "taking action to terminate the employment of the two professors." App:34.[12, 13, 14]

15. At a purportedly a full evidentiary hearing[15] under the CBA at MBCC on July 30-31, 2002, Norman denied Pansé's objection that Norman, as a party-opponent in the then ongoing litigation for retaliation (Fact 8 and nn. 7, 9,) could not judge Pansé. App. 56, 61. Norman also denied requests for documents in the OCR probe (Fact 10.) App:34. Respondent Haidee Morris, *Esq.*, a State employee,

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[12] This letter was obtained as part of discovery during later arbitration as mandated by the CBA (Fact 22, below.)

[13] There was no mention of Norman taking any measures to hear from the two professors, nor did the BHE or Gill ever take any steps to correct Norman as to his written declaration.

[14] Subpoenaed at that arbitration, Norman testified that he wrote that letter to keep his employer and supervisor, Gill, informed.

[15] Pansé declined a pre-hearing meeting under CBA (App:62) with Norman, given Norman's warning to Pansé as to Pansé's exercise of Free Speech in good conscience (Facts 8, 9, 12,) although Pansé, at that time, was not aware of Norman's letter to Gill concerning the pre-hearing declaration.

prosecuted this case at the College, at all CBA procedures which followed, as well as at an unemployment appeal and an appeal to the State Superior Court (*see*, below.) App:27.

16. At the MBCC hearing, there was undisputed evidence of Pansé teaching the one biotech research course in question per approved prior practices, with the society having benefitted from Pansé's work, notwithstanding difficulties to be encountered in highly sophisticated research with cancer cells. App:34-35, 56-57, 61. There was evidence that a 'research course' meant that the class did not meet at set times, but rather, it involved, as but one example, the petitioner driving to MBCC in a snow storm, when all area colleges were closed, in order that a student could enter the laboratory attend to her cells. There was also undisputed testimony that Pansé would conform to any new directive from the State, negating any need to dismiss him. App:57, 62.

17. Norman, with the authority to *recommend* dismissal, terminated Pansé on Aug. 2, 2002.[16] The Trustees failed to vote to ratify this decision as required by their own Bylaws. App:35-36. The BHE failed to take any corrective action in spite of Norman's letter of pre-declaration.

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[16] At arbitration, a subpoenaed Norman testified that he thought for at least a couple of days before reaching his decision to dismiss Pansé; when confronted with evidence on cross examination, Norman admitted that his testimony was untrue.

Other College officials also provided falsified testimony at the college hearing, App:34, 57, and at subsequent arbitration, App:37.

18. Pansé reasserted this evidence at a CBA-mandated hearing at the BHE (App:57, 62,) a relatively informal meeting lasting approximately two hours. Gill's delegatee, respondent BHE Vice-Chancellor Peter Tsaffaras, *Esq.*, was the qusi-adjudicator. *Id.* At the conclusion of this hearing, Tsaffaras was seen huddled with Taylor and Morris, and affirmed the dismissal. App:35.

19. Taylor, as has been warned by this Court (in *Loudermill*, below at 13,) objected to the Pansés' rights to unemployment insurance by alleging dismissal for misconduct. App:36. The State's own unemployment appeal officer, after a hearing, dismissed such allegations and awarded Pansé those benefits. *Id.* However, respondent Commissioner of Unemployment Insurance failed to furnish Pansé these benefits in full and in a timely fashion. *Id.*

20. CBA-mandated arbitration (App:49-54) followed, where Morris caused extreme delays in the post-deprivation process. App:37 and n. 10; 63. She rejected all dates proposed by the Arbitrator in Fall 2002; the Arbitrator held 12 full days of hearings, finally ending in May 2004; Morris rejected all of the Arbitrator's proposed dates in one six month period in 2003, and agreed to dates in April and May of 2004 only at the Arbitrator's insistence that the process had to come to an end. *Id.*

21. The Arbitrator, realized independently and quickly, as the State's own unemployment hearing officer had, that the State had no case, and twice so expressed, urging a quick end to the process. App:37.

22. The Arbitrator set a July 12, 2004 deadline for submission of closing briefs, allowing 66 days for this writing. Morris obviously demanded a one month extension. App:37 n. 10.

23. On November 9, 2004, the Arbitrator made his extraordinary holding: the State could not even subject Pansé to any discipline, "much less discharge" him. App:22, 38.

24. The Arbitrator suggested that the State's actions were related to the ongoing litigation (for retaliation for Free Speech, Fact 8.) App:22.[17]

25. On remand[18], then MBCC President respondent Andrew Scibelli continued the dismissal of Pansé, just as the Office of the State's own Atty. Gen. was admitting in writing that Pansé should now be back to his students in his laboratory. App:38.

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[17] The Arbitrator did not even mention the OCR written warning (Fact 11) in evidence before him, choosing to stay away from it: arbitration is livelihood for an arbitrator; the American Arbitration Association allows all parties to strike three arbitrators from a list of ten arbitrators the Association proposes.

"Arbitrators seek a result that harmonizes parties' positions . . . ." West Group Federal Practice Series. Federal Appeals, Jurisdiction and Practice. 3rd ed., 1999. Michael Tigar and Jane Tigar. § 1.03.

[18] The Arbitrator's power is limited under the CBA to find that a dismissal is arbitrary, capricious or unreasonable, and Order reinstatement and back-pay only if the President refuses. App:50-51.

26. Respondent Governor Mitt Romney, *Esq.*, failed to take any corrective action even though he was personally aware that a member of his own cabinet was engaged in federally prohibited retaliation, and had pursued the resulting deprivation for an unconstitutionally and brutally long period. App:39.

27. The State appealed from the Arbitrator's decision in State Superior court, only to lose. App:23, 24. The Court found that Pansé's dismissal was "reverberations" of the litigation, Fact 8, for the earlier retaliation. App:23.

28. All respondents herein are very highly educated, experienced, knowledgeable and accomplished individuals, and many engaged in communications with other respondents regarding Pansé's dismissal. App:64. Respondents did not ever act impulsively or in error.

29. The State reinstated Pansé on Oct. 19, 2005, but did not furnish all his back-pay (from Aug. 2002) until January 2006, some three and a half years later, and did not reinstate his family medical insurance until June 2006, close to four years after deprivation.[19]

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[19] Pansé moved the U.S. District Court on Nov. 28, 2005 (six weeks after the reinstatement,) for an injunction to enjoin the State from withholding his family medical insurance. This was denied; the U.S. Court of Appeals then rejected an appeal under 28 U.S.C. § 1292(a)(1). This is relevant here for the purposes of showing the length of the deprivations.

30. Respondent's actions caused destruction of a model educational program in biotechnology. Jackson and Pansé had to rebuild the program from the ground since their respective reinstatements.

31. Respondent's actions, at least in part, caused the petitioners extreme harms[20], as had been warned by this Court, (below, at 13,) including, but not limited to, medical injuries and a violent breakup of the Pansé family. App:40, 41.

ARGUMENT[21]

The petitioners respectfully submit that the jurisprudence in the First Circuit, as to the following critical issues, is entirely irreconcilable with that of this Court, as demonstrated here. Such significant deviations from the holdings of this Court warrant further review by this Court.

COURSE OF PROCEEDINGS

Pansé sued in the U.S. District Court (D. MA.) The Court dismissed most of the 2004 *pro se* complaint, App:5-10 (the petitioner graduated from

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[20] During those four years, the petitioner, in his fifties, went without any medical care at all, and could not always afford to take his kids to a pediatrician. State law mandated annual medical reports before the kids could go to school, but the State refused any reimbursement for those pediatricians' services.

[21] Internal citations, emphasis, quotations, etc., in authorities cited here are mostly omitted for brevity of this petition.

law school only in 2008) for failure to state a claim, although a fair reading of the Complaint suggests otherwise. The Court of Appeals affirmed. App:1-2. *Cf.*, *Boag* v. *MacDougall*, 454 U.S. 364, 365 (1982) (it is an error as a matter of law to dismiss a *pro se* complaint for failure to state a cause of action.)

The district court denied, in part, a motion for summary judgment, App:5-10; then granted the part denied earlier, App:11-16. The U.S. Court of Appeals for the First Circuit denied Pansé's motion for standing for his children, App:3; summarily dismissed a timely appeal, App:1-2; and then dismissed a motion to stay mandate.[22]

STANDARD OF REVIEW

A court reviewing a grant of summary judgment looks at "the record in the light most favorable to the non-moving" parties, and draws all reasonable inferences in their favor. *Torres-Negron* v. *Merck & Co.*, 488 F.3d 34, 39 (1st Cir. 2007).

Summary judgment "mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

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[22] Notice of denial of stay was too late for its inclusion in the Appendix accompanying this petition.

I. THE CONSTITUTIONALLY MANDATED PRE-DEPRIVATION DUE PROCESS, FOR TERMINATION OF PROTECTED PROPERTY OR LIBERTY INTERESTS, STANDS DENIED ABSENT AN UNBIASED QUASI-ADJUDICATOR

There is no dispute here that a tenured public employee is entitled to the constitutionally minimum pre-deprivation hearing. *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532, 542 (1985).

At any such hearing, this Court requires a "meaningful opportunity to invoke the discretion of the decisionmaker," even where facts are clear, because this Court has "frequently recognized the severity of depriving a person of the means of livelihood." *Id.*, at 543. *See, also, FDIC* v. *Mallen*, 486 U.S. 230, 243 (1988) (same.) The impact of wrongful termination "may be so devastating," causing such "traumatic disruptions," that the employee will "almost inevitably suffer irreparable injury" which "will never be recompensed." *Id.* at 549-550 (Marshall, J., concurring.) *See, also, Arnett* v. *Kennedy*, 416 U.S. 134, 221 (1974) (Marshall, J., dissenting) (cost to the society from wrongful termination.)

Thus, "By requiring the government to follow appropriate procedures when its agents decide to deprive any person of life, liberty, or property, the Due Process Clause promotes fairness in such decisions." *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986).

For that fairness, "As this Court repeatedly has recognized, due process demands *impartiality* on the part of those who function in judicial or quasi-judicial capacities" (emphasis supplied.) *Schweiker* v. *McClure*, 456 U.S. 188, 195 (1982). The Court does presume that a hearing officer is unbiased, and entertains a rebuttal "by a showing of . . . [a] specific reason for disqualification". *Id.*

The government and the society also benefit by keeping the employee, *Loudermill*, 470 U.S. at 544, justifying "an initial check against mistaken decisions," *id.* at 545. Therefore, this Court does suggest an alternative, till the conclusion of post-deprivation process: suspending with pay. *Id.* at 544.

Thus, this Court mandates an *impartial* hearing officer whose discretion can be appealed to, and who is open to "an initial check against mistaken decisions," in order to promote fairness in governmental deprivations.

Here, Pansé had a constitutionally protected interest in his employment as a tenured professor. Fact 8 n. 8. (He was also protected by the OCR 34 C.F.R. § 100.7(e) written warning. Fact 10.)

Wherefore, this Court should hold that Pansé had a constitutional right to a pre-deprivation hearing with an *impartial* hearing officer, as required by the spirit of *Loudermill* and as mandated explicitly by *Schweiker*.

Here, first of all, quasi-judicial hearing officer Norman, in his capacity as the successor President of

the MBCC, had been found, as a matter of law (*see*, below, at 22-23,) to have retaliated against Pansé for exercise of Free Speech. The litigation was ongoing at the time of the hearing for Pansé's dismissal.[23] Fact 8, nn. 7, 9.

Second, Norman had expressly demonstrated his contempt for Pansé's Free Speech, and so warned Pansé. Fact 11 and n. 11, a critical fact admitted by the State (*see*, Fed. R. Evid. 801(d)(2)(B), App:71.)

Third, Norman wrote to Chancellor Gill that he and other college officials were determined, prior to any hearing, to terminate two professors, "one a black and the other Indian." Fact 14.

Fourth, BHE officials Gill and Tsaffaras demonstrated that they shared Norman's intent to retaliate against Pansé, all agreeing on Norman's pre-hearing declaration of dismissal and all refusing to accept Pansé's assurances that he would abide by any of the employer's then current directives on the issue of how to teach a biotech research course.

That combined intent is equally demonstrated by the fact that the respondents scrupulously avoided any reasonable alternative: they could have assigned Pansé to teach those other (non-biotech) courses regarding which they had no concerns at all (Fact 13,) keeping him away from biotech.

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[23] In Spring 2002, Pansé had deposed some College officials, with respondents herein facing that prospect as well.

The respondents also rejected this Court's *Loudermill* recommendation of suspending with pay, particularly in a case so devoid of cause that the State's own unemployment appeal officer (Fact 19) and the Arbitrator told the State that the State had no case (Facts 21, 23.)[24], [25]

Wherefore, this Court should conclude that Norman did not have the power to dismiss, and if he did, he was not nearly sufficiently unbiased to serve in a quasi-adjudicatory role.

This Court should conclude that the hearing at BHE was neither pre-deprivation (occurring weeks after dismissal,) nor was it post-deprivation process (being only a short and relatively informal hearing, Fact 18.) It was only what the CBA called for.

Wherefore, this Court should conclude that Pansé was denied a fair pre-deprivation opportunity to be heard, that the respondents merely went through the motions of a pre-deprivation process, and that thus Pansé was denied his constitutional pre-deprivation guarantees.

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[24] On the other hand, the State cannot possibly justify any balancing interest in destroying a biotech program which was a national model for NSF, Fact 30, nor can the State profess any interest in suppression of academic free speech for the betterment of education.

[25] In both the State and the federal courts, the respondents have attempted to relitigate the arbitration proceedings and to re-argue their claims rejected by the Arbitrator and the State Superior Court. However, arbitration cannot be relitigated at all. *See, post,* at 24.

The Court of Appeals for the First Circuit employed a different standard (App:2): *Chmielinski* v. *Mass. Office of the Comm'r of Prob.*, 513 F.3d 309, 318 (1st Cir. 2008) ("We have held that there is *no* requirement that the hearing officer be impartial") (emphasis supplied.) *Cf.*: *Schweiker*, 456 U.S. 195 (impartiality *is* demanded.)

This Court has held that due process is flexible. However, there can be no due process at all without an adequate degree of impartiality on part of the quasi-adjudicator to avoid a mistaken decision and to require fairness in the government's decisions. Even where grounds exist for termination, a *Loudermill* appeal to discretion of the government is impossible without a fair and impartial hearing officer.

Wherefore, this Court should hold that the First Circuit holding on this issue is irreconcilable with this Court's *Schweiker* requirement of impartiality.

The Court of Appeals did hold that the lack of impartiality "does not itself determine whether bias can be so severe as to interfere with due process at the hearing itself." *Chmielinski*, 513 F.3d 318. Even under this standard, the respondents here were impermissibly biased on account of factors above, and as demonstrated by the overwhelming evidence.

Wherefore, this Court should find that the pre-deprivation Due Process here could not possibly meet the constitutional minimum.

II. DENIAL OF TIMELY POST-DEPRIVATION DUE PROCESS UPON TERMINATION OF PROTECTED PROPERTY AND LIBERTY INTERESTS IS UNCONSTITUTIONAL

"[T]he allegation of a distinct due process violation in the [post-deprivation] administrative delay is not an alternative theory supporting the same relief, but a separate claim altogether." *Loudermili*, 470 U.S. 547 n. 12. This Court has "[E]mphasized that . . . account must be taken of the length . . . of the deprivation," *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982), because due process requires a hearing "at a meaningful time and in a meaningful manner," *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965).

At some point, a delay in the post-termination does become a constitutional violation. *Barry* v. *Barchi*, 443 U.S. 55, 66 (1979) (suspension of trainer when his horse was found drugged, post-deprivation hearing followed only a few days later.)

Promptness, or lack thereof, in post-deprivation due process must be considered. *Gilbert* v. *Homar*, 520 U.S. 924, 932 (1997) (suspension of security guard upon being arrested on drugs related charges.) If a post-deprivation hearing sufficiently prompt, the lost income for an employee can be relatively insubstantial and health insurance may not be affected at all. *Id.* This Court did remand *Homar* for determination of damages from deprivation of a few days. *Id.*, at 936.

However, even prompt post-deprivation process may not "make the employee economically whole again, and the wrongfully discharged employee will almost inevitably suffer irreparable injury." *Loudermill*, 470 U.S. 550 (Marshall, J., concurring.)

A 9-month long post-deprivation adjudication was not unconstitutional *per se* where there was only a conclusory claim that it took too long, without an allegation of a cause. *Loudermill*, 470 U.S. at 547. However, the Court plainly did "not state a flat rule that 9-month delays . . . will pass constitutional scrutiny as a matter of course." *Id.*, at 553 (Brennan, J., concurring in part and dissenting in part.)

Here, Morris, refusing to agree to any date for the post-deprivation arbitration process for months at a time, Fact 20, and demanding more than three months to submit a written closing argument, Fact 22, resulted in extreme delays and extreme harms: three and a half years for Pansé without his paycheck and back-pay, and four years without his family's medical insurance. Facts 29, 31 and n. 20.[26]

As to this distinct cause of action, this Court should hold that the courts below did not comply with *Barchi* and *Homar*, where delays of more than a few days in the post-deprivation process were unconstitutional (even where there existed a cause for dismissal,) and therefore the petitioners deserve to be recompensed for delays of up to four years in full reinstatement.

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[26] This, where the State had no case whatsoever as found at the unemployment appeal and at arbitration.

III. THE SUBSTANTIVE COMPONENT OF THE DUE PROCESS CLAUSE PROTECTS EVEN IF PROCEDURAL DUE PROCESS IS PROVIDED IN UNFOUNDED DEPRIVATION OF PROTECTED PROPERTY OR LIBERTY INTERESTS

The "Due Process Clause, like its forebearer in the Magna Carta, was intended to secure the individual from the arbitrary exercise of the powers of government." *Daniels* v. *Williams*, 474 U.S. 331. "The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff* v. *McDonnell*, 418 U.S. 539, 558 (1974). "Due Process Clause was intended to prevent government officials from abusing power, or employing it as an instrument of oppression." *Collins* v. *Harker Heights*, 503 U.S. 115, 126 (1992).

"(B)y barring certain government actions regardless of the fairness of the procedures used to implement them," the substantive part of the due process clause "serves to prevent governmental power from being used for purposes of oppression." *Daniels* v. *Williams*, 474 U.S. at 331. ". . . [T]he Due Process Clause of the Fourteenth Amendment . . . contains a substantive component, sometimes referred to as substantive due process, which bars certain arbitrary government actions regardless of the fairness of the procedures used to implement them." *Id.* at 337 (Stevens, J., concurring).

Here, similarly, it makes no difference at all as to what procedural due process the respondents purportedly provided to Pansé, for, as determined by

the State's own unemployment appeal officer and then independently by the Arbitrator, no action whatsoever against Pansé could be justified. No individual in good faith could possibly have reached the decision to dismiss Pansé which the respondents here reached, regardless of the fairness of the procedures used to reach it.[27]

The decisions which the State officials made were not made in the heat of some moment (such as a police officer in hot pursuit.) The official's actions here were preplanned, and the decisions made well in advance, with time to reflect while sitting in comfortable furniture in comfortable offices.

Such decision-making was then compounded by ignoring multiple indications, from the State's own unemployment appeal officer and then repeatedly and independently from the Arbitrator, that the state had no case against Pansé. Yet the total deprivation continued, year after year after year.

Wherefore, this Court should hold that such conduct by State officials in such circumstances and for such length of time indeed was outrageous or unreasonable, that the petitioner's substantive due process rights were violated, that it was plain error for the lower courts to dismiss this claim, and that the petitioners are entitled to be recompensed by a jury.

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[27] Whatever governmental interest there was in destroying a model educational program for the advance of minorities in science, said objectives could not be accomplished without also destroying Pansé's rights under the Due Process Clause.

IV. THE FULL FAITH AND CREDIT CLAUSE APPLIES TO A COURT'S THRESHOLD RULING ON A QUESTION OF LAW, FINDING RETALIATION IN VIOLATION OF THE FREE SPEECH CLAUSE

The Full Faith and Credit Clause of the Constitution of the United States, Article IV, § 1, and 28 U.S.C. § 1738, bound the courts below to the State Superior court's rulings that the respondents had retaliated against Pansé at the time of his dismissal.

Where a public employee claims retaliation in violation of the Free Speech Clause, "The inquiry into the protected status of speech is one of law, not fact." *Connick* v. *Myers*, 461 U.S. 138, 148 nn.7, 10 (1983). Once the employee prevails in this showing that an adverse employment action was the result of protected speech, the burden shifts to the employer to show other unprotected conduct for the adverse employment action. *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 287 (1977).

The resolution of this question of law, that a speech was protected, was "properly withheld from the jury" by the district court, "even though it may have required predicate factual determinations." *Gustafson* v. *Jones*, 290 F.3d 895, 906 (7th Cir. 2002).

Whether speech in question was protected was reviewable on interlocutory appeal, because it was an "abstract issue of law." *Charvat* v. *E. Ohio Reg'l Wastewater Auth.*, 246 F.3d 607, 616 (6th Cir. 2001),

citing the requirement imposed by *Johnson* v. *Jones*, 515 U.S. 304, 317 (1995).

"[W]here the lower state court does not issue a judgment but merely an interlocutory order" and the litigation is terminated, the state court issue is not preclusive; "Nevertheless, the state proceedings have ended, and the Rooker-Feldman doctrine precludes either party from later challenging the order in federal court." *Federación De Maestros De Puerto Rico* v. *Junta De Relaciones Del Trabajo De Puerto Rico*, 410 F.3d 17, 24 n.10 (1st Cir. 2005).

Here, there existed a 1999 State Superior court (Norfolk) determination, as a matter of law, that Pansé had a cause of action in retaliation in violation of Free Speech. Fact 8 and n. 7. That litigation was in progress at the very time the deprivation herein was imposed in 2002 (the burden having shifted to the State to show that the adverse employment action in 1999 was for another proper reason, a jury question.) Those State proceedings then ended in 2003, not on merits, but on procedural issues related to discovery. Fact 8 n. 9. Therefore, under the First Circuit's holding in *Federación De Maestros*, the State could not challenge in the federal courts the holding that Pansé's speech was protected.

Another State Superior court (Suffolk) decision in 2005, Fact 27, was final: that Pansé's dismissal in 2002 was due to his 1999 action for retaliation.

Therefore, the Court of Appeals (and the district court) were bound by both of these rulings as a

matter of law that State officials retaliated against Pansé for his exercise of the Free Speech Clause.[28]

Further, the Arbitrator's findings of facts and holdings of law, both, are binding on State courts in Massachusetts. *BHE* v. *Mass. Teachers Assn.*, 62 Mass. App. Ct. 42 (2004). By appealing the Arbitrator's decision in the State Superior court (Sufolk) and losing (Fact 27,) the respondents bound state courts, and thus the courts below, to all of the Arbitrator's findings, that dismissing Pansé in 2002 had no basis and was linked to Free Speech action.[29]

The district court resolved multiple jury questions, App:15-16, all contrary to Pansé's Affidavits: the period covering the speech, Norman's awareness of it (*cf.*, Fact 11,) etc.

Wherefore, this Court should hold that the courts below were bound by the State holdings that State officials were engaged in retaliation against Pansé, and that Pansé's dismissal was further retaliation for the litigation then underway for retaliation, and that the grant of summary judgment here on Pansé's First Amendment claims was a plain error of law.

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[28] The precedent which the Court of Appeals cited in dismissing the free speech claim, App:1, involved declaratory judgment, and is not applicable here.

[29] Even if the Full Faith and Credit Clause were to be inapplicable here, this Court should let stand the Arbitrator's findings (that the respondents likely retaliated against Pansé for the 1999 Free Speech action.) *Teamsters Local Union No. 42* v. *Supervalu, Inc.*, 212 F.3d 59, 61 (1st Cir. 2000) ("Arbitral awards are nearly impervious to judicial oversight.")

V. CONGRESS HAS EXPRESSLY PROVIDED ARTICLE III JUDICIAL REMEDIES FOR VIOLATIONS OF CIVIL RIGHTS AS DISTINCT FROM STATE LAW ARBITRAL CURES

The U.S. Congress intended any cause of action under 28 U.S.C. § 1983 to be judicially enforced. *McDonald* v. *City of West Branch*, 466 U.S. 284, 290 (1984). An arbitrator's expertise "pertains primarily to the law of the shop, not the law of the land," *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 57 (1974).

This is because the very purpose of § 1983 is to provide judicial protection from any violation of the constitutional rights by individuals wielding state power. *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972). Therefore, an arbitrator's authority is confined to resolution of questions of contractual rights, regardless of whether they resemble or duplicate Title VII rights. *Alexander*, 415 U.S. at 52.

The arbitration at union-shops is between the union and the employer, rather than between a grievant and the employer, and the interests of the individual and the union may not be compatible. *Barrentine* v. *Arkansas-Best Freight System, Inc.* 450 U.S. 728, 743 (1981). *See*, App:21, 23 (Pansé was not a party.) Thus, arbitration is well suited to disputes in contracts, and only a judicial proceeding can adequately protect the federal constitutional and statutory rights that § 1983 is intended to safeguard. *McDonald*, 466 U.S. at 290.

The Fist Circuit has held likewise: "Title VII contained an express private right of action, . . . and involved adjudication of the rights of an individual under the Constitution, an inquiry that, with all due respect to arbitration, has historically been the sole province of Article III adjudication." *Page* v. *Moseley, Hallgarten, Estabrook, and Weeden, Inc.*, 806 F.2d 291, 297 (1st Cir. 1986).

Here, however, the State argued repeatedly in the courts below that the arbitral cures (reinstatement and back-pay after years of suffering) is all that Pansé can be entitled to.

The petitioners did assert their rights under 28 U.S.C. § 1983. App:27. There is no question that individual respondents were all State employees. They, without cause, deprived Pansé of his salary for years, and deprived the petitioners of any health insurance for years. The Arbitrator had no power to recompense for the harms caused to anyone's health. This violated the petitioner's Fifth Amendment interests in their property and liberty, as incorporated by the Fourteenth Amendment.

These deprivations caused the petitioners severe harms, as repeatedly anticipated and warned by this Court (*see*, above at 13.)

Wherefore, this Court should hold that any arbitral remedies aside, this Court's precedents mandate that the Pansés are entitled to § 1983 remedies, and thus it was plain error of law for the courts below to dismiss these claims.

VI. A PARENT HAS STANDING TO SUE *PRO SE* ON BEHALF OF HER OR HIS MINOR CHILD

Third party standing is available, even for unrelated persons, if justifications underlying prohibition of such standing are absent, as when "the enjoyment of the right [to sue] is inextricably bound up with the activity the litigant wishes to pursue," and "the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter." *Singleton* v. *Wulff*, 428 U.S. 106, 114-115 (1976) (doctor had standing to sue state on behalf of potential future patients.)

In spite of the "general reluctance to permit a litigant to assert the rights of a third party," the standing to sue on behalf of another is granted where three preconditions are satisfied: (1) one has suffered an injury in fact; (2) has a close relationship to the third party; and (3) there exists some hindrance for the third party to assert her/his own rights. *Campbell* v. *Louisiana*, 523 U.S. 392, 397 (1998); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 629 (1991); *Powers* v. *Ohio*, 499 U.S. 400, 411 (1991) (the due process rights of unknown citizen to serve on a jury.) The Court has "been quite forgiving with these criteria in certain circumstances." *Kowalski* v. *Tesmer*, 543 U.S. 125, 130 (2004). *See, also*, *Miller* v. *Albright*, 523 U.S. 420, 447 (1998).

The right of *pro se* representation has long been recognized. *See*, e.g., above at 12 (the right to have a *pro se* complaint read liberally.)

Here, the rights of the petitioner and his minor kids are "inextricably bound up," all having suffered due to the same acts of the same respondents. There obviously exists an extremely close relationship between the father and his kids. The father, who sat for the bar examination on July 30-31, 2008, is very nearly as capable as counsel to argue for his minor children.

There are also significant public policy issues. Not allowing a *pro se* parent to represent her or his child(ren,) unless the parent can afford counsel, results in denial of all justice to the minor child till she or he comes of age.[30] Not only is justice delayed, but could end up being denied if evidence, once fresh and available, has, after some years, become too cold with fading memories or lost witnesses. It is also not in the interests of efficiency of justice to conduct multiple trials of the same claims, based on the same evidence, first for the parent and then the child(ren).

The Court of Appeals cited 28 U.S.C. § 1654 for denying standing for the lead petitioner to sue *pro se* on behalf of his minor children. App:3. However, this Court has made third-party standing available in essentially identical circumstances, as above.

Wherefore, this Court should hold that the lead petitioner, Pansé, has standing to sue *pro se* on behalf of his minor children.

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[30] In the case at bar, one of the minors involved was born with severe mental retardation as a result of a genetic defect; this child will never be competent, ever, to have any standing for anything anywhere.

CONCLUSION AND RELIEF SOUGHT

Petitioners respectfully submit that the severity of the abuses of governmental power and the severity of harms caused by these abuses, and the significance of the deviations of the courts below from the precedents of this Court, suggest that this Court review this matter and hold as follows.

I. In view of a biased quasi-adjudicator who was determined to dismiss Pansé before any hearing, Pansé was denied pre-deprivation due process.

II. Pansé was denied the constitutionally mandated prompt post-deprivation due process.

III. Given the total lack of substance behind the deprivations, and the written civil rights warning, actions of the State officials were outrageous, and Pansé's substantive due process rights were violated.

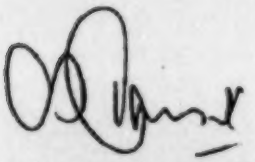
IV. State court holdings, as a matter of law, that Pansé's speech was protected, are binding on the lower federal courts, and the petitioners are entitled to their day before a jury for a retaliation claim.

V. The petitioners state a valid cause of action under 28 U.S.C. § 1983, and are entitled to determination of damages by a jury.

VI. Pansé has standing to represent his kids *pro se*.

VII. Dismissal of a *pro se* complaint for failure to state a claim was an error of law.

Respectfully submitted,



Chandrakant Pansé, J.D.[31]
MassBay College
Biotechnology Program
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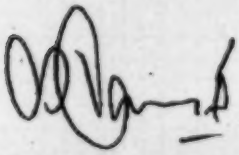
Wellesley Hills, MA 02481



Two Minors, through their
father and best friend
Chandrakant Pansé

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[31] Anjali Pansé, an adult daughter of Chandrakant Pansé, was a Plaintiff-Appellant in the action below. However, the father-daughter alienation, caused by the actions of the State, is so extensive and severe that the daughter chose not to trust her father any further and be a party to this petition.

United States Court of Appeals
For the First Circuit

No. 07-2352

CHANDRAKANT S. PANSE, ET AL.,

Plaintiffs, Appellants,

v.

LINDSAY NORMAN, PERSONALLY AND AS PRESIDENT, MASSACHUSETTS BAY COMMUNITY COLLEGE, ET AL.,

Defendants, Appellees

Before

Torruella, Circuit Judge,
Stahl, Senior Circuit Judge,
and Howard, Circuit Judge.

JUDGMENT

Entered: June 6, 2008

After carefully considering the briefs and record on appeal, we affirm for substantially the reasons stated by the district court.

The appellant was not terminated in a manner

that violated his rights to procedural or substantive due process. Chmielinski v. Massachusetts, 513 F.3d 309 (1st Cir. 2008); Wojcik v. Mass. State Lottery Comm'n, 300 F.3d 92, 102 (1st Cir. 2002); Amsden v. Moran, 904 F.2d 748, 754 (1st Cir. 1990). Collins v. Marina-Martinez, 894 F.2d 474, 480 (1st Cir. 1990). Nor did the appellant make any showing that he was fired in retaliation for protected speech. Miho v. Swift, 358 F.3d 91, 102 (1st Cir. 2004).

Affirmed. 1st Cir. Loc. R. 27.0(c).

By the Court:

/s/ Richard Cushing Donovan, Clerk

cc:
Anjali Panse
Chandrakant S. Panse
Charles M. Wyzanski

United States Court of Appeals
For the First Circuit

No. 07-2352

CHANDRAKANT S. PANSE, ET AL.,

Plaintiffs, Appellants,

v.

LINDSAY NORMAN, PERSONALLY AND AS PRESIDENT, MASSACHUSETTS BAY COMMUNITY COLLEGE (MBCC), ET AL.,

Defendants, Appellees

ORDER OF COURT

Entered: December 17, 2007

The motion of Chandrakant S. Panse to represent minor children is denied. See 28 U.S.C. § 1654.

By the Court:
Richard Cushing Donovan, Clerk

Margaret Carter
By: _____
Chief Deputy Clerk

[cc: Charles M. Wyzanski, AAG,
Chandrakant S. Panse]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 04-11658-RWZ

CHANDRAKANT S. PANSE,

v.

LINDSAY NORMAN, et al.

MEMORANDUM OF DECISION

September 16, 2005

ZOBEL, D.J.

Pro se plaintiff Chandrakant S. Panse began teaching biotechnology and related courses at Massachusetts Bay Community College ("MBCC") in 1993 and received tenure in 1999. Three years later, MBCC initiated an investigation in response to student complaints about plaintiff that resulted in a recommendation of his dismissal by Lindsay Norman, MBCC president. After a hearing, MBCC terminated plaintiff's employment. He lost on appeal to the Massachusetts Chancellor of Higher Education but succeeded in arbitration initiated on his behalf by the Massachusetts Community College Council (the "MCCC") under the terms of the collective bargaining agreement (the "CBA") governing his employment. The arbitrator found no just cause for plaintiff's dismissal and remanded the matter to Norman for reassessment. Norman reaffirmed the termination, and MCCC's appeal is currently pending.

Contemporaneously, plaintiff filed the instant action against Norman and several other MBCC

employees (collectively, "MBCC defendants"), the Chancellor and Vice Chancellor of the Board of Higher Education (together, "BHE defendants"), Governor Mitt Romney, and John King, Commissioner of the Division of Unemployment Assistance ("DUA"). Although plaintiff also named the Board of Trustees for MBCC and the state Board of Higher Education as defendants, he did not specify any counts against them. His amended complaint set forth the following claims under 42 U.S.C. § 1983 against MBCC defendants, BHE defendants and Governor Romney, all in their personal capacities: Count I, assault and battery; Count II, intentional infliction of emotional distress; Count III, violation of certain rights under the United States and Massachusetts constitutions; Count IV, defamation; and Count VII, violation of certain unnamed additional duties. Plaintiff alleged assault and battery in Count V and conversion and invasion of privacy in Count VI, both under 42 U.S.C. § 1983, against Laurie Taylor, individually and personally, as the MBCC defendant who served as Director of Personnel and Affirmative Action Officer. Plaintiff also accused Mr. King and DUA in Count VIII of violating a duty for prompt and timely processing of benefits. Count IX does not contain additional allegations but, instead, identifies further remedies sought by plaintiff in addition to those listed in each of the counts I through VIII. All defendants moved for dismissal or, in the alternative, summary judgment on all counts.

Each of the counts challenged conduct under 42 U.S.C. § 1983. "A person may recover damages [under § 1983] from a state or local official who, while acting under color of state law, commits a

constitutional tort." Wilson v. Town of Mendon, 294 F.3d 1, 6 (1st Cir. 2002). Only in part of Count III, however, did plaintiff allege violation of federally created rights. The claims raised in the other counts involve rights typically secured under state law, and plaintiff identified no legal basis – and the Court is unaware of any such basis on the present record – for alleging these other counts under federal law or the Constitution. Accordingly, defendants' motion to dismiss is allowed as to all counts except for Count III.

In Count Ill, plaintiff's remaining federal claim, he asserted two violations of his federal constitutional rights by MBCC defendants, BHE defendants and Governor Romney. First, he argued that defendants' means for terminating him and the resulting elimination of benefits effected a denial of procedural and substantive due process under the Fifth Amendment. Second, he characterized his dismissal as a retaliatory act by these defendants in response to his exercise of the First Amendment right to freedom of speech. As to the first violation, defendants asserted that they provided sufficient procedural and substantive due process. Regarding the second violation, they disputed both that plaintiffs speech triggered First Amendment protection and that a causal relationship existed between such speech and plaintiff's dismissal. Additionally, in general defense to both federal claims, defendants asserted qualified immunity as public officials whose conduct would not reasonably be construed as violating plaintiff's rights. It is clear from the parties' briefs that factual disputes underlie all of these claims. Because summary judgment is thus inappropriate at this stage of litigation, defendants' motion is denied as to

Count III. Dismissal is also denied, as defendants have not identified any insufficiencies in plaintiffs actual pleading of these claims. As defendants asserted no basis for summary judgment or dismissal of plaintiff's claims in Count III under the Massachusetts Constitution, these also survive defendants' motions.

With respect to the other counts, defendants' motion to dismiss would be allowed even if the Court treated these as having been properly pled under state law. In Count I, plaintiff argued that the elimination of medical and dental benefits . . . in connection with his termination "and the resulting humiliation and physical harm amounted to unconsented to touching and hence battery with transferred intent, upon plaintiffs by defendants." Am. Compl. ¶ 52. He further asserted that the apprehension experienced with "every incidence of need of medical or dental care" amounted to assault. Am. Compl. ¶ 53. Under Massachusetts law, battery involves an unconsented to, intentional, harmful or offensive touching of another person. See Waters v. Blackshear, 412 Mass. 589, 590-591 (1992). An attempted or threatened battery constitutes assault. See Conley v. Romeri, 799, 805 n.6 (2004). Because the absence of medical and dental care and resulting humiliation do not amount to a "touching" under the law, defendant's motion to dismiss would be allowed as to Count I.

Plaintiff contended in Count II that conduct by . . . defendants . . . surrounding the circumstances of his dismissal resulted in their intentional infliction of emotional distress upon him. In order to establish

this tort, plaintiff

> must establish '(1) that the defendant[s] intended to inflict emotional distress, or knew or should have known that emotional distress was the likely result of his conduct, but also (2) that the defendant[s'] conduct was extreme and outrageous, beyond all possible bounds of decency, and utterly intolerable in a civilized community, (3) the actions of the defendant[s] were the cause of plaintiff's distress, and (4) the emotional distress suffered by the plaintiff was severe and of such a nature that no reasonable person could be expected to endure it.'

Tetrault v. Mahoney, Hawkes & Goldings, 425 Mass. 456, 466 (1997), quoting Payton v. Abbott Labs, 386 Mass. 540, 555 (1982). Plaintiff failed to identify any specific conduct by defendants as the basis for this claim, and none of the conduct alleged in the Amended Complaint rises to the level of malice required to demonstrate such intentional infliction. Whether defendants acted with proper motive and fully executed their duties remains in dispute, but plaintiff has not alleged any facts that, if proven, would establish conduct by defendants "beyond all possible bounds of decency." Accordingly, Count II would be dismissed.

In Count IV, plaintiff alleged defamation . . . . He must establish that

> (a) [t]he defendant[s] made a statement, concerning the plaintiff, to a third party. . . [,] (b) [t]he statement could damage the plaintiffs reputation in the community. . . [,] (c) [t]he defendant[s] [were] at fault in making the statement. . . [and] (d) [t]he statement either caused the plaintiff

> economic loss . . . or is actionable without proof of economic loss.

Ravnikar v. Bogojavlensky, 438 Mass. 627, 629-30 (2003). In his pleading, plaintiff failed to identify any specific defamatory statements or the author of any such statements, much less a causal relationship between the statements and his alleged injury. Count IV would thus be denied.

Plaintiff asserted Counts V and VI against a single MBCC defendant, Laurie Taylor . . . . In Count V, plaintiff charged Ms. Taylor with assault and battery for delivering the termination decision to plaintiff "with a 'bang,'. . . in an unconsented to and offensive manner." Am. Compl. ¶ 65. In light of the Massachusetts law on civil assault and battery already discussed, defendant's motion to dismiss is allowed, as plaintiff failed to plead the elements necessary to establish a prima fade case in Count V. Count VI regards Ms. Taylor's alleged invasion of privacy and conversion of plaintiffs personal property by ordering and supervising the removal of certain of his belongings from his office without his permission. Invasion of privacy occurs upon violation of the statutory "right against unreasonable, substantial or serious interference with [an individual's] privacy." Mass. Gen. Laws ch. 214, § IB. Plaintiff has not pled facts sufficient to demonstrate an "unreasonable, substantial or serious" interference with his privacy. "Conversion requires the exercise of dominion or control over the personal property of another." Third Nat. Bank of Hampden County v. Continental Ins. Co., 388 Mass. 240, 244 (1983). Plaintiff provided only an incomplete listing of items allegedly converted, including computer data, an item in which his

ownership interest is, at best, unclear. Moreover, plaintiff never reconciled his alleged ownership interest with the fact that he had been fired and presumably no longer had authority to maintain his belongings in his prior office. Defendants' motion would be allowed as to both Counts V and VI.

In Count VII, plaintiff contended that . . . defendants . . . "owed [him] certain duties, particularly in view of the special relationships existing amongst the parties, that defendants, acting under the color of state laws, breached those duties, that plaintiff suffered injuries and damages, and further that defendants' conduct was a cause in fact and proximate cause of plaintiffs' damages." Because plaintiff did not identify any certain duty, conduct, injury or damage in this Count VII, defendants' motion to dismiss would be allowed.

Defendant's motion to dismiss would also be allowed on Count VIII. Plaintiff argued that John King, DUA Commissioner, and/or DUA itself breached a duty to pay unemployment benefits on a timely basis. However, plaintiff did not identify any statutory, regulatory or common law authority that established such a duty, much less the elements of an action for its violation.

Accordingly, defendants' motion for dismissal and/or summary judgment (#15 on the docket) is allowed except as to Count III.

/s/ Rya W. Zobel
DATE RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 04-11658-RWZ

CHANDRAKANT S. PANSE,

v.

LINDSAY NORMAN, et al.

MEMORANDUM OF DECISION

July 26, 2007

ZOBEL, D.J.

I. Background

. . .

On September 16, 2005, this court dismissed all claims against defendants except Count III. (Docket # 30.) Defendants now move for summary judgment with respect to that claim. (Docket # 53.)

II. Pending Motions

Now pending is defendants' motion for summary judgment. In denying the motion to dismiss (or, in the alternative, for summary judgment), I noted "[i]t is clear from the parties' briefs that factual disputes underlie alt of [the Count III] claims. Because summary judgment is thus inappropriate at this stage of litigation, defendants' motion is denied as to Count III." (Docket # 30.) However, after the summary judgment motion hearing held in October

2006, it is now apparent that any disputes as to the facts have evaporated. In 1993, Massachusetts Bay College hired plaintiff and in 1999 he was granted tenure. In March 2002, after receiving student complaints about plaintiff, the college initiated an investigation at the conclusion of which the College's Vice President for Academic Affairs recommended to defendant Lindsay Norman, then-President of MBCC, that Panse be dismissed. Plaintiff was afforded a formal hearing pursuant to the CBA, during which he was represented by counsel. On August 2, 2002, Norman terminated plaintiff. Plaintiff appealed his dismissal to Judith Gill, Chancellor of Higher Education under the CBA. Plaintiff's appeal was denied and his dismissal upheld.

In a separate action, the MCCC Union sought arbitration on plaintiff's behalf. The arbitrator concluded that plaintiff's dismissal was procedurally flawed because the college failed to first give "notice [to plaintiff] that he must change his program or face discipline and discharge." (Docket # 56-3, Award of Arbitrator, Case No. 1139-2407-02.) The arbitrator then remanded the matter to the President of the College for reassessment of the decision. Norman's successor reaffirmed plaintiffs dismissal.

On December 15, 2004, the union again took the matter to the arbitrator who found that plaintiff's dismissal was arbitrary and capricious and ordered that plaintiff be reinstated. The college sought to vacate the arbitrator's award, but the Massachusetts Superior Court affirmed the award and remanded to the arbitrator. See Massachusetts Bd. of Higher

Educ./MBCC v. MTA/Massachusetts Community College Council, Civ. No. 05-0696-H, 2005 WL 2292643 (Suffolk Super. Ct. Sept. 14, 2005). After remand to the arbitrator, the college reinstated plaintiff and paid him back pay and benefits. Plaintiff now seeks emotional distress and punitive damages for alleged violations of his due process rights.

To make out a claim for procedural due process, plaintiff must demonstrate that "[plaintiff] had a property interest defined by state law; and (2) that defendants, acting under color of state law, deprived [him] of that interest without adequate process." Licari v. Ferruzzi, 22 F.3d 344, 347 (1st Cir. 1994). There is no dispute here that plaintiff had a property interest in his position or that the college is a state actor. The issue is what measure of process he was due. "[T]he ultimate conclusion about procedural adequacy. . . turns on the full set of pre-and post-deprivation procedures available." O'Connor v. Pierson, 426 F.3d 187, 197 (2d Cir. 2005).

It is well established that a tenured professor who faces the possibility of dismissal is at least entitled to "[n]otice and an opportunity to be heard" prior to termination. Newman v. Commonwealth of Massachusetts, 884 F.2d 19, 23 (1st Cir. 1989); see also Collins v. Marina-Martinez, 894 F.2d 474, 480 (1st Cir. 1990) ("[] a tenured employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story") (internal citations omitted). Here, plaintiff cannot demonstrate that he was denied adequate process. He was provided with a formal statement of the

charges against him, he had the opportunity to call witnesses and present testimony. He was given a written decision and afforded the opportunity to appeal. Plaintiff points to no case holding that the failure to provide advance warning or progressive discipline prior to termination, without more, violates constitutional due process.

Plaintiff further contends that the process was inadequate because: (1) Norman was biased in that he was a defendant in a separate pending state court lawsuit brought by plaintiff; and (2) Norman had decided to dismiss plaintiff prior to the commencement of the hearing, as evidenced by a letter dated June 2, 2002. (Docket # 56-3, Pl.'s Mem. in Supp. of Opp. to Def.'s Mot. for Summ. J., Ex. B.) Plaintiff's arguments are unpersuasive. His dismissal was affirmed by Norman's successor, Judith Gill, who was an independent party (and not herself the subject of a lawsuit by plaintiff). Moreover, plaintiff does not dispute that he was afforded an adequate post-deprivation remedy, viz., the CBA arbitration. Indeed, courts have routinely held that such procedures do not violate due process. See Wojcik v. Mass. State Lottery Comm'n, 300 F.3d 92, 102 (1st Cir. 2002) ("the full arbitration hearing afforded by the collective-bargaining agreement was more than sufficient to satisfy the requirement for a post-deprivation hearing").

Nor can plaintiff establish a violation of his substantive due process rights. The college's dismissal of plaintiff without first providing progressive discipline does not shock the conscience. See, e.g., Amsden v. Moran, 904 F.2d 748, 754 (1st

Cir. 1990) ("[] before a constitutional infringement occurs, state action must in and of itself be egregiously unacceptable, outrageous, or conscience-shocking").[1]

Finally, plaintiff has alleged that he was terminated in retaliation for exercising his free speech rights regarding, inter alia, "the nature and level of education imparted by community colleges." (Docket # 21, Complaint ¶ 18.) In order to prevail on a claim that a governmental employer retaliated against an employee for speaking out, a plaintiff must establish a prima facie case that: (1) the "speech involves a matter of public concern;" (2) the "First Amendment interests and the public outweigh the government's interest in functioning efficiently;" and (3) the "protected speech was a substantial or motivating factor in the adverse action against the plaintiff." Mihos v. Swift, 358 F.3d 91, 102 (1st Cir. 2004).

Plaintiff contends that his speech was a matter of public concern, and that the balance of interests weighs in his favor; the college disputes both contentions. I need not resolve this dispute. Here, plaintiff cannot demonstrate that his dismissal was motivated by the protected speech. See Gomez v.

---

[1]Because I find that there was no procedural or substantive due process violation, I need not address defendants' contention that they are entitled to qualified immunity. See Cotnoir v. Univ. of Maine, 35 F.3d 6, 10 (1st Cir. 1994) (government actors not subject to liability where "a reasonable official could have believed his actions were lawful in light of clearly established law and the information the official possessed at the time of his allegedly unlawful conduct").

Pellicone, 986 F. Supp. 220, 230-31 (S.D.N.Y. 1997) (granting defendant's motion for summary judgment where plaintiff failed to establish a prima facie case that termination was the result of her speech; nor could plaintiff "rebut the defendant's legitimate, nondiscriminatory justifications for the challenged employment actions"). Even accepting the facts as he has alleged them, his statements regarding the quality of education at the college were made two years before his termination. It is axiomatic that retaliation may only be inferred where the dismissal follows in close proximity to the protected speech. See Oliver v. Digital Equip. Corp., 846 F.2d 103, 110-11 (1st Cir. 1988) (affirming the district court's grant of summary judgment for the employer on plaintiffs retaliation claim where plaintiff failed to establish that the speech was a motivating factor in plaintiff's dismissal). Moreover, there is no evidence in the record that Norman was aware of plaintiff's allegedly protected speech.

III. Conclusion

Accordingly, defendants' motion for summary judgment (Docket # 51) is ALLOWED. Judgment may entered for defendants.

July 26, 2007 /s/ Rya W. Zobel

DATE

RYA W. ZOBEL
UNITED STATES
DISTRICT JUDGE

Commonwealth of Massachusetts
NORFOLK SUPERIOR COURT
Civil Docket

NOCV1999-00287
Panse v van Winkle Individually et al.

Date	Action entered
. . .	. . .
2000 Jan 3	re: Defts' Motion to dismiss all official capacity claims and counts 1-3, 5-7, 9-11 and 14 against Defts individually(mk) —Motion ALLOWED as to Counts 1,2,3,7, 9,10,11 and 14 against the defendants in both their individual and official capacities: Defendants' Motion to dismiss counts 4,5,6,8,12 and 13 is allowed against defendants in their official capacities only. Motion to Dismiss Counts 5 and 6 against Defendants in their individual capacities is DENIED: THE PARTIES ARE Referred to the Norfolk Count office of RESOLUTION FOR MEDIATION OF THIS MATTER. No later than January 31, 2000, the parties shall notify the Court in writing whether they have agreed to mediate this dispute. . . . (GANTS, J) 12/30/99(mk) cs
. . .	. . .

next page

4/23/ 2002	Pre-trial ORDER: After a Litigation Control Conference on April 9, 2002 before the Honorable Elizabeth Donovan, the Court ORDERS: All discovery to be completed by June 10, 2002; for good cause, STATUS conference is scheduled for June 13, 2002 at 2:00 P.M. (Donovan, J.)
. . .	. . .
1/14/ 2003	Application (33a) of Defendant, Roger van Winkle Individually v. Plaintiff, Chandrakant S Panse for Final Judgment and affidavit.
	. . .
1/16/ 2003	Affidavit of Maite A. Parsi in support of Roger Van Winkle's Application for Final Judgment (rec'd 1/14/03)
	. . .
2/03/ 2003	Deft, Roger Van Winkle's application for final judgment for failure to respond to final request for answers pursuant to Rule 33a (rec'd 1/27/03)
	. . .
2/28/ 2003	deft. Roger Van Winkle notice of application for final judgment cs
. . .	. . .
2/28 2003	FINAL JUDGMENT-The complaint of the plff. Chandrakant S Panse' is dismissed as to the deft. Roger Van Winkle, personally and in his capacity as President and Consultant, Massachusetts Bay Community College. cs

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss: SUPERIOR COURT
C.A. No. 99-287

Chandrakant S. PANSE, plaintiff

v.

Roger VAN WINKLE, personally and in his capacity as President and Consultant, Massachusetts Bay Community College, & . . . defendants

AMENDED COMPLAINT

1. Community colleges . . . ("CC") serve a compelling need for the society . . . . CCs have open enrollment, i e , are mandated to accept all applicants with high school diplomas or GEDs, irrespective of any grades or screening tests . . . . Many individuals, working menial jobs, find a CC to be one of the last opportunities for education and betterment, average age of students at a CC can be about 30.

. . .

10. Plaintiff believes, and therefore avers, that CC education in science, however, suffers from a very poor reputation as substandard education.

. . .

COUNT FIVE: Pansé v. Van Winkle

79. Plaintiff repeats and incorporates by reference herein each and all allegations . . .

80. Plaintiff contends that defendant Van Winkle, in retaliation against plaintiff, brazenly intended to intimidate, terrorize and silence the plaintiff, and so intimidated and terrorized the plaintiff, and violated plaintiff's free speech rights, civil rights and rights of academic freedom, by forbidding the plaintiff from communicating plaintiff's views for betterment of a public institution with the head of said institution, all in attempts to damage the plaintiff both professionally and personally.

81. Wherefore, plaintiff demands judgement against defendant Van Winkle to make the plaintiff whole again . . .

COUNT SIX: Panse v Van Winkle

82. Plaintiff repeats and incorporates by reference herein each and all allegations . . .

83. Plaintiff contends that defendant Van Winkle, in retaliation against plaintiff, brazenly intended and planned to intimidate, terrorize and silence the plaintiff, and so intimidated and terrorized the plaintiff, with such unique tool as forwarding arguments made during selection of a new president to said new president, and further, carried out said plan in order to spoil the professional relationship between the new president and the plaintiff and so succeeded in spoiling said relationship, all in attempts to damage the plaintiff both professionally and personally.

84. Wherefore, plaintiff demands judgement . . . .

AMERICAN ARBITRATION ASSOCIATION
ARBITRATOR'S OPINION & AWARD

Before Michael W. Stutz, Arbitrator

In the Matter of Arbitration between

MASSACHUSETTS COMMUNITY COLLEGE COUNCIL / MTA / NEA

-and-

BOARD OF HIGHER EDUCATION,
Massachusetts Bay Community College

Panse Dismissal
Merits
AAA Case No. 1139-2407-02

AWARD of the ARBITRATOR

The undersigned arbitrator, having been designated in accordance with the Parties' arbitration agreement, and having duly heard the proofs, allegations and contentions of the Parties, AWARDS as follows:

1. There was no just cause for the dismissal of the grievant.
2. The President's decision to dismiss the grievant was arbitrary, capricious or unreasonable based on clear and convincing evidence.
3. The matter is remanded for reassessment of the original decision by the President of the College.
4. The undersigned hereby retains jurisdiction in accordance with the Agreement.

November 9, 2004

/sd/
Michael W. Stutz

. . . The absence of notice to the grievant prevents there being just cause to discipline, much less to discharge the grievant.

The fact that the grievant was discharged in the middle of litigation against the College raises the possibility that the grievant's firing was related to the litigation. The performance charges were unsupported by prior notice to the grievant or the usual evaluation procedures. Although Rotation II in the spring of 2002 had some difficulties, these problems were not so egregious as to form a basis to terminate this tenured professor without any prior discipline or other efforts by the administration to solve the problems with the course. After reviewing all of the evidence, I conclude that the College did not have just cause to terminate the grievant.

<u>The President's decision to terminate the grievant was arbitrary, capricious and unreasonable</u>

Having concluded that there was no just cause to terminate the grievant, we next consider whether the President's decision was arbitrary, capricious or unreasonable, that is whether President Norman had reason to terminate the grievant, or, rather, whether the decision was arbitrary, capricious or unreasonable.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 05-0696-H

MASSACHUSETTS BOARD OF HIGHER EDUCATION / MASSACHUSETTS BAY COMMUNITY COLLEGE, Plaintiffs

vs.

MASSACHUSETTS TEACHERS ASSOCIATION / MASSACHUSETTS COMMUNITY COLLEGE COUNCIL, Defendants

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS TO VACATE THE ARBITRATION AWARD AND DEFENDANTS' MOTION TO CONFIRM ARBITRATOR'S AWARD

. . .

In 1993, Professor Panse joined the College's faculty. He became eligible for tenure in 1999, but he was initially denied tenure on the basis of an unsatisfactory evaluation. Panse brought a legal action challenging the determination. Thereafter, the evaluation was favorably revised, and he was awarded tenure. However, reverberations of the litigation continued, including Professor Panse's allegations of retaliation for his public criticism of

the College and its administrators. (The Boston Globe published two articles about the controversial relationship between Professor Panse and the College in October 2001.)

. . .

Certainly G.L.c. 15A, § 22 empowers officials at community and state colleges to appoint and dismiss members of their faculties. However, where such officials have negotiated away much of the substance of that authority, they are not in a position thereafter to assert that the grievance mechanism –itself a product of collective bargaining– is not lawfully available to review their decisions then circumscribed by the terms of a collective bargaining agreement. . . .

ORDER

For the foregoing reasons, the plaintiffs motion for judgment on the pleadings to vacate the arbitration award is DENIED and the defendant's motion to confirm the arbitration award is AFFIRMED. This case is further remanded to the arbitrator for a calculation of the amount of damages, if any to be awarded to Panse for the College's violation of the Collective Bargaining Agreement.

/sd/
D. Lloyd Macdonald
Justice of the Superior Court

September 14, 2005

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
C. A. No. 04-CV-11658-RWZ

Chandrakant S. PANSÉ,
A... Pansé, a minor, through her father &
Best Friend Chandrakant Pansé,
M... Pansé, a minor, through his father . . .
R... Pansé, a minor, through his father . . . plaintiffs

v.

Lindsay NORMAN, personally and as President,
Mass. Bay Community College ("MBCC,")
Paula GASTENVELD, personally and as
Vice President, MBCC,
Laurie TAYLOR, personally and as
employee of MBCC,
Ghazi DARKAZALLI, personally and as
Dean, Science & Technology, MBCC,
Thomas SABBAGH, personally and as
Assoc. Dean, MBCC,
Board of TRUSTEES, MBCC,
Judith I. GILL, personally and as
Chancellor of Higher Education of Mass.,
Peter H. TSAFFARAS, personally and as
Assoc. Vice Chancellor of Higher Education,
Board of Higher Education (BHE) of Mass.
John A. KING, Commissioner, Div. of
Unemployment Assistance, Mass.,
Mitt ROMNEY, personally and as Governor, Mass.
Andrew SCIBELLI, personally and as
Interim President, MBCC,
Haidee A. MORRIS, personally and as
Community College Counsel, defendants

AMENDED COMPLAINT & Demand for Jury Trial

Parties

1. Plaintiff Chandrakant Pansé, *M.Sc.*, *M.A.*, *Ph.D.*, US citizen (hereafter only "plaintiff" or "Pansé" for simplicity unless other plaintiffs are specified), has been a tenured professor in a Science and Technology Division at Massachusetts Bay Community College ("MBCC"), a state college in Wellesley, Massachusetts, till his malicious and fraudulent termination in Summer '02. Since 1990 he has been adjunct faculty at Boston University School of Medicine, where he teaches advanced subjects in a biotechnology ("biotech") program. A..... Pansé, M..... Pansé, and R..... Pansé are his minor children. . . . .

. . .

3. Both Board of Higher Education of Massachusetts ("BHE") and the Board of Trustees of MBCC (including any Committee or Subcommittee of the Board, hereafter collectively "Trustees") are "employer" pursuant to the Collective Bargaining Agreement ("CBA", see Exhibit for relevant extracts) by and between BHE and a faculty bargaining unit (although plaintiff's paychecks bore the signature of the Treasurer of the Commonwealth).

4. At MBCC, Norman, . . . appointed by votes of Trustees and BHE, had been president since Mar. 1999, and retired in Oct. 2004. Scibelli has been interim president since October 2004. Gastenveld was Vice President from Jan. 2001 to Nov. 2002. Darkazali has been Dean since Jan. 2000, and Sabbagh Associate Dean since Oct. 2000, of said Science and Technology Division. Taylor has been Dean/Director of personnel and Affirmative Action Officer at least since 1998.

5. Morris, *Esq.*, is employed by Massachusetts community colleges as General Counsel.

6. Gill and Tsaffaras have been Chancellor and Associate Vice Chancellor, respectively, of Higher Education and employees of defendant BHE.

7. Mr. John King has been Director, Division of Employment and Training, and now Commissioner, Division of Unemployment Assistance (DET/DUA), of this Commonwealth.

. . .

Jurisdiction

9. Subject Matter Jurisdiction, Arising Under Federal Constitution or Laws: Pursuant to 28 U.S.C. § 1331, this Court has jurisdiction in this action as plaintiffs' claims are based on violations of (i) plaintiffs' rights under Title VII of the Civil Rights Act of 1964 and its implementing regulations, 42 U.S.C. § 1983 and any other applicable statutes and rules, all applicable to MBCC, Trustees and BHE as they all receive Federal financial assistance, defendants having violated said rights while acting under the color of Mass. statutes, ordinances, regulations, custom or usage, ***in spite of a written warning by a federal attorney to not retaliate against or intimidate plaintiff, and further to take appropriate steps to prevent any hostile or threatening actions against plaintiff*** in view of a pending civil rights complaint and a federal investigation of MBCC pursuant to 34 C.F.R. § 100, (ii) plaintiff's rights to due process pursuant to Fifth Amendment of Bill of Rights, made applicable to defendants herein by Amendment XIV, (iii) all plaintiffs' protected property interests in

Pansé's tenured professorship pursuant to said Fifth Amendment,
(iv) all plaintiffs' protected liberty interests through Pansé's status in his profession pursuant to said Fifth Amendment,
(v) all plaintiffs' protected property interests in medical, dental and other insurances and other intangibles, whether reduced to writing or otherwise, as provided to all employees of defendants, pursuant to said Amendments, and
(v) plaintiff's free speech rights pursuant to the First Amendment.

10. Jurisdiction Over Parties & Venue Jurisdiction: All actions on which plaintiffs base their claims were committed in Massachusetts, in the course of being an employee of the state or as a result of being such an employee. All plaintiffs and most of the defendants are residents of Massachusetts. Wherefore, this Court has jurisdiction over parties as well as venue jurisdiction.

11. Supplemental Jurisdiction: This Court has supplemental jurisdiction in this action regarding any and all pendent claims under Massachusetts laws per 28 U.S.C. § 1367 (a).

ALLEGATIONS

12. Plaintiff believes, and therefore avers, each of the allegations *infra*.

13. Plaintiff was employed as associate professor to teach biotech in particular and science in general at MBCC from August 1993 to Spring 1996, when he was promoted to professor. Employer attempted to

block plaintiff's tenure in February 1999 by giving him an 'unsatisfactory' evaluation. Plaintiff sued in State Superior Court pursuant Mass. G. L. c. 149 § 185 (the 'whistleblower' statute) and rights pursuant to the First Amendment.[2] Plaintiff was awarded tenure in Summer 1999, and served until his dismissal in Summer 2002.

14. Beginning in 1993, a professor B. Jackson and plaintiff designed and developed a new and highly innovative program in biotech to replace a non-working program then in existence at MBCC. Five new laboratory "research" courses (later reduced to four), called Rotations I - V after similar curricula in many Ph.D. programs in biological sciences, formed a critical component of said renovated biotech curriculum, advanced level of instruction in sciences in other new courses being another critical part. Community college students, some with prior baccalaureate degrees from elsewhere, at least since 1994 till plaintiff's said dismissal, not only spent long hours, including during nights and weekends and holidays and snow-storms when the college was locked up, in the biotech program laboratory for the purposes of fulfilling the requirements of said rotation research courses, but, with unending encourage-

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[2]In that action, the Superior court denied provisions of plain statutory language as well as holdings of the 1st Circuit of Appeals regarding the whistleblower claims; the Office of the Attorney General of the Commonwealth attempted to obtain discovery long after deadline for conclusion of discovery pursuant to the court's Tracking Order, said deadline having been extended repeatedly, and then filed Reapplications pursuant to Mass. R. Civ. Practice 33a. A Superior court judge, without a hearing, denied plaintiff's Motion to remove said fraudulent Reapplications. *Pansé* v. *Van Winkle* et al., NOCV 99-287.

ment of said two faculty, have also presented their work at research meetings[4]. Not only was the college aware of this nature of instruction in the biotech program,[5] and obtained the necessary approval(s) for said innovative program, but also made arrangements to accommodate program needs and provided encouragement. The National Science Foundation (NSF), an agency of the Federal government, has held up said community college program as a model to be emulated throughout the US.

15. Prof. Jackson, Principle Investigator (PI) and plaintiff, Co-PI, with others, also secured Research Experience for Undergraduates (REU) / Research Opportunities for Minorities (ROMP) grants at MBCC from NSF, totaling over $ 740,000 in seven years, in order to promote the numbers of minorities in sciences. Jackson and plaintiff also secured other grant monies from private Foundations.

16. As a result of their extraordinary efforts, Jackson and plaintiff have enjoyed the unique gratification of seeing most of their community college students, a high percentage of them single mothers, minorities, etc., get advanced degrees in biological sciences or excel in the biotech industry. The prior president of MBCC advised the plaintiff that BHE . . . was highly complimentary of said accomplishments. Plaintiff asserts that not many

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[4]Plaintiff testified, in substance, at MBCC that a cure for cancer would not be found at a two-year college; rather, the goal was to get community college students excited about, and knowledgeable in, scientific research.

[5]as indicated by sworn depositions of MBCC officials

forms of social service can be better than such converting of single mothers and inner city minority youths into high-earnings taxpayers and contributing to the advancement of our country in science . . .

17. Further, after community colleges became eligible to nominate their students (2 per year, each, as opposed to 4 per year for institutions granting baccalaureate or higher degrees) for the Congressional Barry Goldwater Scholarships in Science and Mathematics, 10 students in the innovative Jackson-Pansé community-college-program won the honor in 7 years, a fete surpassed only by the likes of Princetons, MITs and Stanfords of this world.

18. During his employment, plaintiff, driven by a quest for academic excellence, had been outspoken regarding the nature and level of education imparted by community colleges (as amply illustrated by the disrepute in which stands the community college education), and administrative issues therein, and dire needs for improvements in said areas. Norman, similarly to the MBCC president he replaced, had explicitly expressed his displeasure at said protected activities, failed in his duties to provide the plaintiff a secure atmosphere conducive for academic work, harassed him, and engaged in undue retaliation. Similarly, Gastenveld, Darkazalli and Sabbagh, just as their predecessors, engaged in undue harassment of and retaliation against the plaintiff.

19. In 2001, Jackson[6], PI, filed complaints with

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[6]Jackson, an African-American and also a tenured professor, was also terminated by MBCC in Summer '02 . . . .

the Office for Civil Rights in US Department of Education for MBCC's refusal to fairly administer the federal grant and for retaliation, based on race, and an attorney in said Office issued the written warning, *supra*, to refrain from retaliation or intimidation. Plaintiff cooperated fully with an ensuing federal investigation.

20. MBCC then proceeded to the most bizarre act of refusing to accept the federal monies for bettering the science education of minority students. Norman, meeting with students, lied regarding his actions therein. Some of the defendants herein were directly involved in said despicable act of abrogation of the federal goal of increasing the number of minority persons in scientific fields; others knew or should have known of said despicable act, as the most prominent newspaper in New England, viz., the Boston Globe, covered this issue.

21. In Spring 2002, some students, unwilling and/or unable to gain from the extraordinary opportunities awaiting them[7], complained to Darkazalli and/or Sabbagh regarding the nature and practices in the research rotation course being taught by the plaintiff. Instead of honoring plaintiff's demands to follow a student-grievance procedure, in existence at the college as the exclusive means to handle student

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[7]". . . schools, whether . . . community colleges, or universities, do not provide an education. They can only provide an educational opportunity for their students. Each student decides what he or she does with the opportunity."

-William M. Bulger, *Esq.*, President, University of Mass. From "*College is a given. Now, tell them how to get there*," the Boston Sunday Globe, Education Section, Dec. 26, 1999.

complaints, and instead of relying on said procedure particularly in light of the federal warning, *supra*, and in spite of the resulting necessity to stay away from even any appearance of retaliation or intimidation in view of said federal warning, Darkazalli and Sabbagh, under the direction of and/or in conspiracy with Norman, Gastenveld and Taylor, set out to employ said student complaints for their purposes of retaliation or intimidation and/or furthering their conspiracy to retaliate or intimidate.

22. Plaintiff explained to Darkazalli, Sabbagh, Gastenveld and Taylor what the past practices in the rotation classes had been and how said practices had yielded wonderful results and how the College not only approved said practices but encouraged them; said defendants acknowledged said explanations. . . .

23. Darkazalli and Sabbagh produced a report, malicious and fraudulent in part, from a purported investigation of said one class taught by plaintiff; Darkazalli and Gastenveld forwarded to Norman a malicious and fraudulent recommendation, based on lies, to dismiss plaintiff from employment at MBCC, all in furtherance of said retaliation and/or a conspiracy to retaliate, where the most retaliation they could possibly justify was either to direct plaintiff to change the innovative and highly successful research methods in the biotech program or to assign plaintiff to courses about which defendants had no questions (i.e., classes other than the research rotations).

. . .

25. On or about 5-21-2002, Taylor had the notice of MBCC's charges served at plaintiffs' home, allegedly intentionally, in a shocking and offensive and humiliating and manner.

26. In a letter dated 6-02-02 to Gill, Norman alerted her that "*we* have determined" that two tenured professors, "one a black and the other Indian", had failed in their teaching duties, and the College was "taking action to terminate the employment of the two professors" (emphasis added).

27. In order to satisfy Article XV of the CBA, Norman et al. conducted a sham hearing . . . . cf. Paragraph 26. ... , plaintiff enjoyed significant rights of due process. Norman denied plaintiff due process both substantive and procedural, . . . by refusing to recuse himself from the hearing as a party in litigation with the plaintiff and thus incompetent to judge the plaintiff in an impartial manner, and in other ways such as not admitting evidence favorable to plaintiff, making a complete farce of said hearing.

28. At said hearing at which plaintiff's methods of teaching, in accordance with past practices at MBCC and with full knowledge of MBCC, in only one specific biotech rotation, *supra*, was in question, . . . , Norman could at most instruct . . . to assign the plaintiff non-rotation non-research classes and had no rationale for recommending termination of plaintiff's employment to the employer.

29. Gastenveld, Darkazalli and Sabbagh all lied under oath at said hearing.

30. . . . In spite of undisputed evidence of plaintiff teaching in accordance with nothing other than approved prior practices, . . . , and in absence of any document to demonstrate that the college had at any time asked the plaintiff to change any of said practices, Norman, . . . with no heed to the federal

warning, *supra*, communicated his decision, preset in conspiracy, to dismiss plaintiff to Trustees.

31. Where Norman had authority per CBA Article 15.02 (2) to only recommend dismissal (to the employer), and where the due process only went so far as to put the plaintiff on notice for only a recommendation for dismissal, Norman abused due process and dismissed plaintiff. Tsaffaras, Gill, BHE and Trustees allowed, and participated in, said abuse.

32. An appeal to Gill, as Chancellor of Higher Education . . . ensued pursuant to the CBA. . . . , said appeal was heard by Tsaffaras, who openly expressed surprise at the entire affair and professed that he would consult repeatedly with Gill. Tsaffaras, Gill and BHE knew or should have known that charges against plaintiff were without any substance whatsoever and that plaintiff was offered no due process, and further that the entire affair was no more than illegal retaliation. However, Tsaffaras, was seen huddled with Taylor and Morris at the conclusion of said appeal hearing, allegedly to join the conspiracy to retaliate. Tsaffaras, Gill and BHE upheld the illegal action of dismissal and retaliation.

33. To the extent that the Trustees can be construed as the employer, the Trustees, pursuant to their Bylaws, were required to examine the actions of Norman in termination of a tenured faculty on the grounds of serious misconduct and upon conduct of due process, and had no provision in the Bylaws for not fulfilling said requirement. Further, a vote of the entire Board of Trustees was required for any action so grievous as termination of a tenured faculty due to serious misconduct. Trustees failed entirely

on such counts, allegedly in the conspiracy with other defendants to retaliate, and have been grievously derelict in their fiduciary duty to MBCC.

34. Taylor, in furtherance of said retaliation and/or of conspiracy to retaliate, denying the plaintiff the opportunity to recover certain of his personal and intellectual property from his office upon said fraudulent "dismissal", ordered and supervised the cleaning out of plaintiff's desk and office, and thus violated plaintiff's privacy, and caused significant loss of said property, and caused humiliation of plaintiff, all very intentionally.

35. Taylor, in furtherance of the said retaliation and/or of conspiracy to retaliate, interfered with plaintiff's rights to unemployment insurance by claiming fraudulently to DET/DUA that plaintiff was terminated for misconduct, and lied under oath in attempt to harm plaintiff at a DET/DUA appeal hearing. After a hearing officer upheld plaintiff's appeal, unidentified employees of DET/DUA, recklessly or negligently or in conspiracy with some of the defendants, failed to furnish the plaintiff his benefits in any kind of timely fashion.

36. Parties have been in arbitration pursuant to the CBA, where Article X limits the Arbitrator's authority to awarding only reinstatement and back-pay. This action, however, is neither precluded by the arbitration process nor is untimely[8].

37. Norman, Gastenveld, Darkazalli, Sabbagh

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[8]cf. *Blanchette* v. *Westwood*, 427 Mass. 176 (1998).

and former MBCC president Van Winkle all lied under oath at the arbitration.

38. Morris did everything possible to prolong the arbitration proceedings beyond two years (e.g., rejecting all possible dates in a six month period in '03-'04) as part of the retaliation scheme, and produced a number of plaintiff's students as witnesses for MBCC, each of whom contradicted himself/herself under oath. Morris attempted to mislead the Arbitrator regarding MBCC refusing to accept NSF monies. Further, in attempts to intimidate plaintiff's witness, she allegedly misled a Judge of the Superior Court in a separate action by that witness to stop his academic records from being introduced at arbitration in violation of FERPA.

39. On 4-17-2003, the Arbitrator suggested[9], in substance, that MBCC's actions were unjustified and MBCC should therefore "settle". Morris responded by producing Castenveld to lie wildly under oath on the next scheduled day (viz., 8-1-2003). The Arbitrator repeated his said observation and suggestion on 2-04-2004.[10]

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[9]in an action equivalent to a *sua sponte* directed verdict

[10]After Morris rejected proposed hearing dates in 2002, the Arbitrator held ***12*** days of hearing, where numerous witnesses were produced, starting 1-28-03 and ending 5-07-04. Dates in April and May 2004 were agreed to only when the Arbitrator in early 2004 declared that he did not want to see this matter in July 2004. The Arbitrator had set 7-12-04 as the deadline for parties to submit briefs for closing arguments, allowing 66 days for said writing. The briefs, however, were not submitted till on or about 9-20-04, 4½ months after close of evidence.

40. In his written decision, conveyed on 11-10-2004, ***the Arbitrator held that MBCC could not even justify any discipline against the plaintiff, "much less to discharge" him.***[11] The Arbitrator did not even mention the written federal warning, *supra*, although it was in the evidence before him.

41. Scibelli knew that there existed a weighty federal warning, as well as allegations amounting to fraud with malice regarding the termination of plaintiff. On 11-10-04, Scibelli knew or should have known of the Arbitrator's holding. Yet, on Pearl Harbor Day, 12-07-04, he conducted a sham "settlement conference", also attended by Taylor and Morris; said conference was over almost before the parties had settled in their chairs. On 12-08-04, Scibelli conveyed his decision to continue the fraudulent termination of plaintiff and formally sealed his participation in the defendants' malicious conspiracy.

42. On 12-08-04, AG's Office, representing the defendants in their official capacities, communicated its position to the plaintiff, in writing, " . . . As a matter of modesty and efficiency, I'd suggest you *(plaintiff)* (sic) now go back to your students and your lab ... . " *(emphasis and material in parentheses added)*, i.e., in substance, the wrongfully dismissed plaintiff be reinstated at once. To which the plaintiff could only respond, "I could think of going back to my students and my lab, as you suggest, if your morally

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[11]The Arbitrator, outside the formal hearing process, repeatedly referred to his work as a business. As prudent businessmen, Arbitrators try to demonstrate balance and refrain from making findings greatly favoring any one party, trying their best to avoid upsetting a party.

challenged clients herein would let me."[12]

43. His Excellency Mr. Mitt Romney knew, or should have known, that there existed a weighty federal warning, as well as allegations amounting to fraud with malice against his administration, and the Arbitrator's holding. Mr. Romney, pursuant to oath of his Office, has thus himself owed a duty to the plaintiffs to direct those defendants, appointed by and answerable to the Governor, to stop any and all retaliatory schemes and reinstate the plaintiff at once . . . . Mr. Romney[13] has failed in said duties to plaintiffs, either intentionally, or recklessly, or negligently, causing harm to the plaintiffs.

44. Defendants' conduct was a result of their collective belief that they, represented by an unethical Office of the state's A. G. (see Footnote 1), could not lose in the state's courts. The AG's Office, further, in the action herein, attempted to intimidate and/or humiliate the plaintiff by writing to him, in substance, that the plaintiff is greedy and vindictive to seek justice. Said Office also threatened, in writing, to employ delaying tactics in this Federal Court by means of a possibly fraudulent motion.

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[12]Also from the AG's: "The world may be, as you *(plaintiff)* say, a nasty place, but I see no reason to make it nastier than necessary" *(parentheses added for clarity)*. In substance, drop your lawsuit.

Plaintiff's response, in exasperation: "Plaintiffs give up their legitimate claims in the name of controlling nastiness, in order that defendants can feel less restrained to perpetuate their frauds. Brilliant. Absolutely brilliant."

[13]who has been less than complimentary of the state college faculty in his public pronouncements

45. Extraordinarily outrageous actions by state officials acting under the color of law against an extraordinary educator and public servant, where the Arbitrator held that there existed grounds for absolutely no action whatsoever and where there has been a federal warning, with lies under oath by high state officials and repeated misconduct by the Office of the state Attorney General, and the resultant destruction of an exemplary program in education that was to be a national model, also constitute fraud upon the society.[14]

46. Retaliatory and outrageous actions of defendants, in violations of the Constitution and the laws and federal warning, whether with malice or otherwise, fraudulent and/or intentional and/or reckless and/or negligent, caused the plaintiff to suffer from grave humiliation in his profession, in his neighborhood, in the community and in the society, from apprehension of such humiliation, and resulted in infliction of severe emotional distress and resulting physical ills, and loss of critical insurance for dental and medical care; and caused plaintiffs A..., M... and R... Pansé, plaintiff's dependants, to suffer from loss of critical insurance for dental and medical care, and humiliation and emotional distress. Plaintiff also suffered from loss of consortium with his minor children, and said minor children suffered from loss of consortium with their father. Plaintiffs also suffered economic damages, due to causes such as, but not limited to, inability to refinance their mortgage when interest rates were at record lows,

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[14]This is the material, stranger than fiction, which best-selling books and blockbuster movies are made of.

inability to have deferred compensation invested in equities when the stock markets were low, interest on loans, including credit card balances, and the resulting poor credit rating.

. . .

48. As . . . another major industrialized state . . . held more than half a decade ago,

> "In this day and age, in this society and culture, and in this State, an ugly, vicious racial slur by a high-ranking public official, who should know better and is required to do better, cannot, in light of this State's strong and steadfast public policy against invidious discrimination, be viewed as a picayune insult. That view would be blind and impervious to the lessons of history."[15]

That holding was about one slur by one official, directed towards one person, *after* said official had offered an apology. In the instant case, there is an army of high-ranking state officials, aided and abated by an unethical Office of the AG, who would rather not administer federal monies and thus would rather deny opportunities in science education to minority students, and would rather ignore due process and a federal civil rights warning, and would rather retaliate. The acts of these officials amount to not one slur, but speak volumes, . . . which caused outrage amongst the legislators of the tiny Black Caucus on the Beacon Hill of this Commonwealth.[16]

49. In view of the moral outrage as exhibited by defendants, plaintiff respectfully submits that

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[15]*Taylor v. Metzger*, 706 A.2d 685, 694 (1998).

[16]Said legislators, however, apparently lacked political capital and clout to take any meaningful steps.

injunctive relief, as deemed appropriate by this Hon. Court, is called for . . . .

. . .

Count One
Assault & Battery per 42 U.S.C. § 1983, Pansés v. Norman, Gastenveld, Taylor, Darkazalli, Sabbagh, Gill, Tsaffaras, Romney, Morris & Scibelli, in personal capacities

51. Plaintiffs repeat and incorporate by reference herein each and all allegations . . .

52. Plaintiffs allege that defendants acting under the color of state laws, with or without actual malice, intended to illegally snatch away[17], or knew with substantial certainty that they would be unduly depriving the plaintiffs of, plaintiffs' medial and dental insurance. This constituted assault on plaintiffs for every incidence of apprehension of need of medical or dental care for any of the plaintiffs, and the resulting humiliation and physical harm amounted to unconsented to touching and hence battery with transferred intent, upon plaintiffs by defendants.

53. Plaintiffs also allege that with defendants acting under the color of state laws, with or without actual malice, intended to snatch away, or knew with substantial certainty that they would be unduly depriving the plaintiffs of, their medial and dental insurance. The resulting humiliation and physical

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[17]cf. *Fisher v. Carrousel Motor Hotel*, 424 S.W.2d 627 (Tex. 1967).

harm from every incidence of need of medical or dental care for any of the plaintiffs constituted unconsented to touching and hence battery on plaintiffs, and the apprehension thereof an assault for each instance of said battery, by defendants.

54. Wherefore, all plaintiffs respectfully demand judgements against said defendants . . . .

Count Two
IIED per 42 U.S.C. § 1983, Pansés v. Norman, Gastenveld, Taylor, Darkazalli, Sabbagh, Gill, Tsaffaras, Romney, Morris & Scibelli, in personal capacities

55. Plaintiffs repeat and incorporate . . . .

56. Plaintiffs allege that defendants, acting under the color of state laws, with or without actual malice, intended to inflict upon the plaintiffs severe emotional distress by their outrageous[18] and offensive[19] and persistent behavior, or knew with

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[18]An attempt to intentionally shock and harm a person's peace of mind by invading the person's mental or emotional tranquility constitutes extreme and outrageous behavior, as such behavior may be beyond all possible bounds of decency and may be utterly intolerable in a civilized community. *Boyle* v. *Wenk*, 378 Mass. 592, 595 (1979). Further, the defendant's repeated actions can be considered in their totality, rather than individually, in order to determine if the defendant's behavior led merely to bad manners and hurt feelings, or was extreme and outrageous conduct. *Id.*

[19]Massachusetts State Senate President, The Hon. Mr. Robert E. Travaglini, speaking at the JFK Library in Boston, on or about 11-16-2004, labeled the lack of health insurance for *any* resident of Massachusetts to be "a moral failing" and "morally unacceptable for a society"; media reports indicate that defendant His Excellency Mr. Romney and State House

substantial certainty that such behavior would inflict upon the plaintiffs severe emotional distress, due to loss of employment, economic hardship, lack of medical and dental insurance, and the resulting humiliation[20]. Plaintiffs did in fact suffer from severe emotional distress, and consequent physical injuries, as a result of said causes.

57. Wherefore, all plaintiffs respectfully demand judgements against said defendants . . .

Count Three
Violations of Due Process and Constitutional Rights, Conversion/Loss

58. Plaintiff repeats and incorporates . . .

59. Plaintiffs allege that the defendants denied plaintiff dues process, both substantive and procedural, and without any immunity or any other privilege to do so. The Arbitrator's holding necessarily proves such lack of due process. Plaintiffs also claim retaliation and denial of his First Amendment rights to free speech, his Fifth Amendment rights to property and liberty interests, as well as his rights pursuant to the Massachusetts Constitution, Part the First, Declaration of Rights, Articles 1, 10 and 29. This resulted in conversion, or alternatively losses, of plaintiff's property and interests, some of which the Arbitrator is not empowered to order

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Speaker The Hon. Mr. Salvatore F. DiMasi concurred, and further that said political leadership will redouble their efforts to correct said moral wrong.

[20]No consequential physical ills required. *Agis* v. *Howard Johnson Co.*, 371 Mass. 140 (1976).

compensation for, including but not limited to, lost fringe benefits and resultant physical injuries, and other injuries described and economic losses. Plaintiffs claim all damages for which the Arbitrator cannot or would not order recovery.

60. Wherefore, plaintiff respectfully demand judgements in order to be made whole again, including but not limited to costs, lawyer's fees and interest, as well as lawful punitive damages.

Count Four
Defamation per 42 U.S.C. § 1983, Pansés v. Norman, Gastenveld, Taylor, Darkazalli, Sabbagh, Gill, Tsaffaras, Romney, Morris & Scibelli, in personal capacities

61. Plaintiffs repeat and incorporate . . . .

62. Plaintiffs allege that defendants, acting under the color of state laws, with or without actual malice, intended to defame the plaintiffs, or knew with substantial certainty that undue termination of plaintiff's employment would cause the plaintiffs to be defamed. Plaintiffs claim that such severe defamation did actually result due to plaintiff's loss of his employment.

63. Wherefore, all plaintiffs respectfully demand judgements against said defendants . . . .

Count Five
Battery and Assault per 42 U.S.C. § 1983, Pansés v. Taylor in personal capacity

64. Plaintiffs repeat and incorporate . . . .

65. Plaintiffs allege that Taylor, acting under the

color of state laws, alone or with other unidentified individuals, with or without actual malice, intended to deliver the very first notice of the defendants' illegal intentions with a 'bang', and arranged for said delivery to be made in an unconsented to and offensive manner, or knew with substantial certainty that the delivery she arranged would be offensive and in a manner unconsented to. Taylor thereby committed battery upon the plaintiffs, and assault by the apprehension thereof.

66. Wherefore, all plaintiffs respectfully demand judgements . . . .

Count Six
Conversion and Invasion of Privacy per
42 U.S.C. § 1983, Pansé v. Taylor, personal capacity

67. Plaintiff repeats and incorporates . . . .

68. Plaintiff alleges that Taylor, acting under the color of state laws, alone or with other unidentified individuals, with or without actual malice, ordered and supervised removal, packing in boxes, and partial destruction of plaintiff's personal property, including but not limited to artwork produced by plaintiff's kids and displayed on office walls and plaintiff's computer, all without opportunity for plaintiff to remove his belongings or notice to or knowledge of plaintiff. Taylor thus intended to violate plaintiff's privacy and cause destruction of his property, or knew with substantial certainty that such would be the results of her actions. Taylor thereby committed conversion and invasion of plaintiff's privacy.

69. Wherefore, plaintiff respectfully demand judgements . . . .

Count Seven
Alternatively Negligence per 42 U.S.C. § 1983,
Pansés v. Norman, Gastenveld, Taylor, Darkazalli,
Sabbagh, Gill, Tsaffaras, Romney, Morris & Scibelli,
in personal capacities

70. Plaintiffs repeat and incorporate . . . .

71. Alternatively to the intentional torts in above Counts, plaintiffs claim that the defendants owed them certain duties, particularly in view of the special relationships existing amongst the parties, that defendants, acting under the color of state laws, breached those duties, that plaintiffs suffered injuries and damages, and further that defendants' conduct was a cause in fact and proximate cause of plaintiffs' damages.

72. Wherefore, all plaintiffs respectfully demand judgements against said defendants . . . .

Count Eight, Pansée v. DET/DUA

73. Plaintiffs repeat and incorporate . . . .

74. Plaintiffs claim that DET/DUA owed them the duties of due process prompt and timely payments of unemployment benefits, particularly in view of the special relationship existing amongst the parties, that defendants breached those duties, that plaintiffs suffered damages, and further that defendant's conduct was a cause in fact and proximate cause of plaintiffs' damages.

75. Wherefore, plaintiffs respectfully demand ...

Count Nine, Injunctive and Special Court Orders

76. Plaintiffs repeat and incorporate . . . .

77. Plaintiff respectfully demands judicial remedies, as this Hon. Court deems appropriate, such as a Court Order to the Governor to dismiss members of BHE and Trustees and the Chancellor, all answerable to him, and appoint . . . responsible individuals to those bodies, for the purposes of the educational and noble goals . . . and for the causes of justice and for the betterment of the society. Plaintiffs also seek injunctive relief to stop all future retaliation or intimidation or harassment or any undue action towards the plaintiff by any of the defendants.

Demand for Justice

78. Plaintiffs respectfully demand justice . . . .

Jury Trial

Plaintiffs claim Trial by Jury on all counts so triable.

Verification

I have prepared myself and read the foregoing and know the contents thereof, and the same is true of my own knowledge, except as to the matters stated therein on information and belief, and as to those matters I believe them to be true.

Respectfully submitted, this 18th day of Dec., 2004,

/s/

Chandrakant S. Pansé, *pro se* . . . .
M. Pansé, a minor, through his father ...
A. Pansé, a minor, through his father ...

EXHIBIT

AGREEMENT ("CBA")
(relevant parts only; in its entirety at http://mccc-union . org/ CONTRACTS/Day/Agreement_99-02.pdf)
by and between The Board of higher Education
and the Massachusetts Community College Council

ARTICLE X - Grievance Procedure

10.06 Step Three - Arbitration

A. . . . arbitration of a grievance may be initiated in accordance with the following provisions:

1. . . . . The decision or award of the arbitrator shall be final and binding for the Association, the employee and the Employer in accordance with applicable provisions of state law.

. . .

4. Such arbitration shall be conducted in accordance with the rules and regulations of the American Arbitration Association in effect on the date of said submission, unless otherwise provided herein; provided, however, that the jurisdiction of the arbitrator to inquire into any issue or to render any award is governed solely by the provisions of this Agreement.

. . .

C. Authority of the Arbitrator

. . . , the arbitrator shall have the authority to make a final and binding award on any dispute concerning the interpretation or application of this Agreement. The arbitrator's authority in matters which are arbitrable is limited to a determination as

to whether the provisions set forth in this Agreement were violated; provided that in matters of professional judgment, the arbitrator shall determine whether the application of such to the grievant has been arbitrary, capricious or unreasonable. Beyond such determination, the arbitrator shall be without power, right or authority to make a decision or to substitute the arbitrator's judgment for that of the Employer or its representatives, except as otherwise provided in this Agreement. The arbitrator shall have no authority to arbitrate: . . . .

3. Affirmative Action/Discrimination. . . .

D. Award of Arbitrator

If the arbitrator determines no express provision of this Agreement has been breached in its application to the grievant as claimed, the arbitrator shall dismiss the grievance. If the arbitrator determines that this Agreement has been so breached, the arbitrator may, subject to the provisions of this Article and except as hereinafter provided, provide an appropriate remedy for the breach; provided, however, that in making any monetary award, the arbitrator shall only provide compensation for actual damages directly attributable to such breach, and shall in no event make any award by way of penal damages.

E. Dismissal and Retrenchment

If a unit member's employment is discontinued as a result of dismissal / retrenchment, and the arbitrator determines based on clear and convincing evidence that the decision of the President of the College or the President's designee was arbitrary, capricious or unreasonable, the arbitrator shall remand the

matter for reassessment by the President of the College or the President's designee of the original decision but shall not have the result or effect of granting any binding award, ... After remand, the President of the College or the President's designee shall have thirty (30) days to render a new decision. If the grievant believes the decision of the President of the College or the President's designee on remand is arbitrary, capricious or unreasonable, the grievant may file an appeal to the original arbitrator . . . in accordance with the provisions of this Article. On appeal, if the arbitrator determines based on clear and convincing evidence, that the decision of the President of the College or the President's designee is arbitrary, capricious or unreasonable, the arbitrator shall have the power to make the grievant whole; provided, however, that any monetary award shall be reduced by way of mitigation by an amount equal to the total income received by the grievant during the period for which monetary damages are so awarded. . . .

Article XI ARTICLE XI - Appointment and Reappointment - Tenure

11.02 Reappointment and Non-Reappointment of Regular Appointments

III. . . . application to faculty . . .

A. Termination of a unit member in that unit member's fifth (5th) regular appointment or later shall be for just cause.

B. Notice shall be in writing given by the President of the College or the President's designee.

ARTICLE XV - Termination, Dismissal, Discipline & Resignation

15.02 Dismissal

Dismissal is defined as the discharging of a unit member for just cause prior to the expiration of that unit member's appointment and shall not be invoked except through due process.

1. Charges relating to dismissal must be filed with the President of the College and may be filed only by the appropriate administrator, to whom the individual is responsible, except that charges may also be made by the President of the College.

2. The President of the College shall notify the unit member that the unit member shall be recommended for dismissal, and, if appropriate request is made, the dismissal shall be preceded by a discussion with the President of the College. The matter may be concluded by mutual consent of the parties at this point.

3. a. If the matter is not concluded, the President of the College shall frame with reasonable particularity a formal statement of charges and shall serve the statement of charges upon the unit member. The unit member may be represented by the Association.

b. Within ten (10) days of the service of the statement of charges upon the unit member, the unit member shall indicate in writing whether the unit member requests a formal hearing. If no such request is received within ten (10) days, it shall be presumed that the unit member waives that unit member's right to a hearing.

4. The President of the College shall conduct the hearing, if held.

5. During the hearing, the unit member shall be entitled to have counsel of that unit member's choice which may include representation by the Association.

6. A verbatim record of the hearing shall be taken and a copy shall be made available to the unit member at that unit member's request for inspection and copying; provided that the Employer and the Association shall share the cost of providing a copy of the transcript to the unit member.

7. a. The unit member shall be afforded an opportunity to obtain necessary witnesses and documentary evidence and the President of the College shall to the extent practicable secure the cooperation of such witnesses and make available necessary documents and other evidence within the President's control.

b. The unit member and the College shall have the right to confront and cross-examine all adverse witnesses. When a witness cannot or will not appear, but the President of the College determines that the interests of fairness require admission of the witness' affidavit, the President of the College shall identify the witness, disclose the witness' affidavit, and give such statement appropriate probative weight in view of the parties' inability to cross-examine.

8. If the decision is for dismissal, the affected unit member may appeal to the Chancellor or Chancellor's designee within ten (10) days after receipt of the decision. The entire record so

established, including the transcript, shall form the grievance record and shall be forwarded to the Chancellor or Chancellor's designee upon receipt of the Step One Appeal. Said appeal shall be construed as a grievance at Step Two of the Grievance Procedure, Article X, but the following expedited procedure shall apply:

a. The Chancellor or Chancellor's designee shall meet with the affected unit member for the purpose of conducting a hearing and shall render a written decision within fifteen (15) calendar days of receipt of the appeal.

b. Within fifteen (15) calendar days after receipt of the decision of the Chancellor or Chancellor's designee or within fifteen (15) days after it was due, the Association may initiate arbitration of a grievance involving dismissal of a unit member in accordance with the rules of the American Arbitration Association.

15.03 Discipline

Nothing in this Article shall preclude the Employer or its representatives from disciplining unit members by means less than discharge, including but not limited to suspension with or without pay, provided that such discipline shall be for just cause; and provided further that a unit member who is suspended without pay shall upon written request be entitled to a hearing within fourteen (14) calendar days after receipt of such request and to back pay in the event the suspension is reversed.

AFFIDAVIT OF PLAINTIFF

I, Chandrakant S. Pansé, do hereby state that the following is true to the best of my knowledge and belief:

1. The Office for Civil Rights in the Department of Education of the Federal Government issued a written warning in 2001, addressed to the President of Massachusetts Bay Community College (MBCC), that in view of a Title VII complaint against MBCC filed with said Office and a resulting investigation by said Office, MBCC was not to retaliate against, and further to take appropriate steps to prevent any hostile or threatening action against, anyone associated with a grant from the National Science Foundation (NSF). The issue involved reluctance or failure of MBCC to administer federal funds, obtained in part through the efforts of the plaintiff herein in his capacity as the Co-Principle Investigator for said NSF grant, for the betterment of minority students in the education in science of such students. Plaintiff, although so covered under said Warning, was subjected to dismissal from tenured professorship at Massachusetts Bay Community College ("MBCC") on August 2, 2002.

2. The defendant President of MBCC had told the plaintiff that MBCC was upset with the plaintiff's exercise of his protected activities and was going to watch the plaintiff specifically.

3. The charges against the plaintiff for the purposes of said dismissal amounted merely to the

fact that during the Spring 2002 semester the plaintiff taught one research-type biotechnology rotation course per long-standing practices of open laboratory and peer-mentoring methods, as necessary for the research environment of the program.

4. The plaintiff has taught numerous other courses at MBCC, and has also been teaching in a biotechnology program at Boston University School of Medicine continuously since 1990.

5. MBCC did not state any charges whatsoever regarding any courses taught by the plaintiff other than the biotech rotation research course, or regarding any other matter whatsoever.

6. At the beginning of a hearing on July 29-30, 2002 pursuant to a Collective Bargaining Agreement, where the plaintiff could be dismissed only for just cause, the attorney for grievant/plaintiff moved that the hearing officer, Norman, recuse himself because Norman was a defendant in lawsuit brought by the grievant/plaintiff and pending at that time in the State Superior Court, and as such, Norman was incompetent to judge the grievant fairly.

7. Undisputed evidence at said hearing established that said biotech rotations had been designed and taught as described herein by the plaintiff from the very inception of said courses in 1993.

8. Undisputed evidence at said hearing also established that college officials had acknowledged

under oath, during depositions in said action in the Superior Court, that they were aware of, and approved of, teaching methods as described by the plaintiff for the biotech rotations.

9. At said hearing, some defendants claimed under oath that they had told the plaintiff to change said teaching methods; plaintiff asserted under oath that no such request or directive ever existed.

10. There does not exist a single piece of evidentiary paper anywhere to substantiate claims by some defendants that they told the plaintiff to change said teaching methods; accounts of meetings written by some defendants themselves, where said meeting were called and conducted by said defendants, demonstrate that no defendant ever told the plaintiff to change said teaching methods.

11. Plaintiff testified at said hearing that he would have undoubtedly changed said teaching procedures had he received any directive whatsoever to so change.

12. Plaintiff repeated said assertions at a CBA Article 15.02 (8) appeal hearing to the designee (Tsaffaras) of the Chancellor (Gill) of Higher Education for the Commonwealth.

13. Plaintiff routinely and till close to the end of his employment at MBCC expressed his concerns regarding the needs for improvements in standards of education at community colleges.

14. While arbitration pursuant to CBA Articles 15.02 (8) (b) and 10.06 was in progress, it became

obvious to the Arbitrator that the employer had no case and the Arbitrator twice suggested to counsels for parties that they "settle".

15. The Arbitrator ruled on November 9, 2004 that the employer had no justification whatsoever to even impose any discipline on the plaintiff, much less discharge him.

16. The Office of the Attorney General for the Commonwealth conveyed its position on December 8, 2004 by e-mail to the plaintiff that the plaintiff should go back to his work now.

17. Even after the finding by the Arbitrator and the opinion of the Office of the Attorney General, the defendants failed to reinstate the plaintiff. On Jan. 30, 2005, the Arbitrator issued an Order pursuant to CBA Article 10.06 (E) that "the Employer shall reinstate the grievant to his position and make him whole for lost benefits under the Agreement, including back pay, minus interim earnings and benefits." The defendants have yet to reinstate him as of making of this Affidavit on February 14, 2005.

18. In August 2002, the plaintiff applied for unemployment benefits, and MBCC claimed that the plaintiff was dismissed for misconduct and therefore was not entitled to said benefits. A hearing officer for the defendant Division of Unemployment Assistance (DUA) ruled in May 2003 that plaintiff had committed no misconduct because the employer had never notified the plaintiff to change the teaching methods in question, and the plaintiff was therefore entitled to unemployment benefits. DUA, without any process whatsoever, denied the plaintiffs

any benefits until December 2003, and never paid the plaintiffs all the benefits due, including benefits for the minor children of the plaintiff ($ 25 per child per week, or approximately $ 325 per month for plaintiff's 3 children).

19. Community Colleges are by law required to accept all students with a high school diploma or a GED, no matter how ill-prepared for college-level work; the average age of an MBCC student has approached 30 when the plaintiff was employed at MBCC, many such students being single mothers, etc.

20. Undisputed evidence at the hearing at MBCC on July 30, 2002, established that the biotechnology program at MBCC, as built by Professors Jackson and the plaintiff herein, had produced unbelievable success stories out of a community college student population.

SIGNED UNDER PAINS AND PENALTIES
OF PERJURY,
this 14th Day of February, 2005,

/s/
Chandrakant S. Pansé

AFFIDAVIT OF PLAINTIFF

I, Chandrakant S. Pansé, do hereby state that the following is true to the best of my knowledge and belief:

1. The Office for Civil Rights in the Department of Education of the Federal Government issued a written warning in 2001 that in view of a Title VII investigation by said Office regarding a grant from the National Science Foundation (NSF). The issue involved reluctance or failure of MBCC to administer federal funds, obtained in part through the efforts of the plaintiff herein in his capacity as the Co-Principle Investigator for said NSF grant, for the betterment of minority students in the education in science of such students. Plaintiff was covered under said Warning, and cooperated fully with two Federal probes of MBCC.

2. The defendant President of MBCC had told the plaintiff that MBCC was upset with the plaintiff's exercise of his protected activities and was going to watch the plaintiff specifically.

3. The charges against the plaintiff for the purposes of said dismissal amounted merely to the fact that during the Spring 2002 semester the plaintiff taught one research-type biotechnology rotation course per long-standing practices of open laboratory and peer-mentoring methods, as necessary for the research environment of the program.

4. The plaintiff has taught numerous other courses at MBCC, and has also been teaching in a biotechnology program at Boston University School of Medicine continuously since 1990.

5. MBCC did not state any charges whatsoever regarding any courses taught by the plaintiff at MBCC other than the one biotech rotation research course in question here.

6. At the beginning of a hearing on July 29-30, 2002 pursuant to a Collective Bargaining Agreement, where the plaintiff could be dismissed only for just cause, the attorney for grievant/plaintiff charged that the hearing officer, Norman, as defendant in lawsuit brought by the grievant/plaintiff and pending at that time in the State Superior Court, Norman was incompetent to judge the grievant fairly.

7. Undisputed evidence at said hearing established that said biotech rotations had been designed and taught as described by the plaintiff from the inception of said courses in 1993.

8. Undisputed evidence at said hearing also established that college officials had acknowledged under oath, during depositions in said action in the Superior Court, that they were aware of, and approved of, teaching methods as described by the plaintiff for biotech rotations.

9. At said hearing, some defendants claimed under oath that they had told the plaintiff to change said teaching methods; plaintiff asserted under oath that no such directive ever existed.

10. There does not exist a single piece of evidentiary paper anywhere to substantiate claims by some defendants that they told the plaintiff to change said teaching methods; accounts of meetings written by some defendants themselves, where said meeting were called and conducted by said defendants, demonstrate that no defendant ever told the plaintiff to change said teaching methods.

11. Plaintiff testified at said hearing that he would have undoubtedly changed said teaching procedures had he received any directive whatsoever to so change.

12. After the Plaintiff was terminated, he repeated said assertions (11, above) at an appeal to the Chancellor's designee Tsaffaras, this appeal being relatively a brief, perfunctory affair with no reporter present and no significant notes taken by anyone present.

13. Plaintiff routinely and till close to the end of his employment at MBCC expressed his concerns regarding the needs for improvements in standards of education at community colleges in general and MBCC in particular; this led to discussions in departmental faculty meetings, with MBCC administrators present, and close (days or weeks) to termination of Plaintiff's MBCC employment. MBCC was opposed to such initiatives as new higher level courses.

14. MBCC challenged the Plaintiff's claim for unemployment benefits on grounds that Plaintiff was fired for misconduct. The Division of Unemployment Assistance of the state ruled on May 6, 2003,

informing the state that the state's actions were wrongful.

15. Defendants refused early dates in 2002 proposed by the Arbitrator where arbitration is supposed to be a speedy and inexpensive process; the Defendants dragged out the arbitration for as long as they could, refusing to accept any date for a six month stretch in the middle of the arbitration hearing.

16. While arbitration was in progress, it became obvious to the Arbitrator that the employer had no case and the Arbitrator said so to counsels on 4-17-2003 and 2-4-2004.

17. The Arbitrator ruled on November 9, 2004 that the employer had no justification whatsoever to even impose any discipline on the plaintiff, much less discharge him.

18. The Office of the Attorney General for the Commonwealth conveyed its position on December 8, 2004 by e-mail to the plaintiff that the plaintiff should go back to his work now.

19. Defendants failed to honor said opinion of the Office of the Attorney General.

20. Community Colleges are by law required to accept all students with a high school diploma or a GED, no matter how ill-prepared for college-level work; the average age of an MBCC student has approached 30 when the plaintiff was employed at MBCC, many such students being single mothers, etc.

21. Undisputed evidence at the hearing at MBCC on July 30, 2002, established that the biotechnology program at MBCC, as built by Professors Jackson and the plaintiff herein, had produced unbelievable success stories out of a community college student population.

22. There exists evidence which would tend to demonstrate that each of the MBCC administrators lied under oath during the processes herein.

23. At a conference on July 12, 2006, the counsel for the Defendants lied to the Court that the Plaintiff's family medical insurance had been reinstated where no such reinstatement occurred until weeks later.

24. Plaintiff believes, based upon reasonable enquiry, that the qualifications and experiences of various state officials as he has claimed, to be true.

25. The issue in the state litigation pending at the time of Plaintiff's termination in 2002 was Plaintiff's First Amendment rights. *Pansé* v. *Van Winkle* et al., NOCV 99-287 (Norfolk Superior Court.)

Signed under pains and penalties of perjury,
this 13th Day of Nov. 2006,

/s/
Chandrakant S. Pansé

CONSTITUTIONAL CLAUSES, STATUTES, REGULATIONS, RULES OF CIVIL PROCEDURE

THE FULL FAITH AND CREDIT CLAUSE, THE CONSTITUTION OF THE UNITED STATES, ARTICLE IV, § 1

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

THE CONSTITUTION OF THE UNITED STATES, AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

THE CONSTITUTION OF THE UNITED STATES, AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases

arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

THE CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1654, APPEARANCE PERSONALLY OR BY COUNSEL

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

28 U.S.C. § 1738, STATE . . . JUDICIAL PROCEEDINGS; FULL FAITH AND CREDIT (January 2004)

. . . .

The records and judicial proceedings of any court of any such State. . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

42 U.S.C. § 1983, CIVIL ACTION FOR DEPRIVATION OF RIGHTS (January 2004)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. . . . .

42 U.S.C. § 1988, PROCEEDINGS IN VINDICATION OF CIVIL RIGHTS (January 2004)

(a) Applicability of statutory and common law. The jurisdiction in civil and criminal matters

conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

CODE OF FEDERAL REGULATIONS, TITLE 34, § 100.7 (34 CFR 100.7). Office for Civil Rights, Department of Education. Nondiscrimination Under Programs Receiving Federal Assistance Through The Department Of Education. Effectuation Of Title VI Of The Civil Rights Act Of 1964, Conduct of Investigations (2001)

(e) Intimidatory or retaliatory acts prohibited. No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted,

or participated in any manner in an investigation, proceeding or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

FEDERAL RULES OF CIVIL PROCEDURE, RULE 12. Defenses and Objections -- When and How Presented -- By Pleading or Motion -- Motion for Judgment on Pleadings (2001, in effect Nov. 2004)

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

. . .

(6) failure to state a claim upon which relief can be granted;

FEDERAL RULES OF CIVIL PROCEDURE, RULE 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings (2001, in effect in 2004)

(a) Judgment As A Matter Of Law

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine

the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

FEDERAL RULES OF CIVIL PROCEDURE,
RULE 56. Summary Judgment
(2001, in effect in November 2004)

(a) For Claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

. . .

(c) Motion And Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to

a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(e) Form Of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify . . . . Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, . . . the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

FEDERAL RULES OF EVIDENCE, RULE 801. Hearsay Definitions (2004)

. . .

(d) Statements which are not hearsay.

. . .

(2) Admission by party-opponent. The statement is offered against a party and is

. . .

(B) a statement of which the party has manifested an adoption or belief in its truth.

MASS. RULES OF CIVIL PROCEDURE,
RULE 33(a). Interrogatories to Parties (1999-2002)

(a) Availability: Procedures for Use.
(4) Application for Final Judgment; Affidavit. . . . . answers or objections have not been received and after the expiration of 40 days from the date of service of the final request for answers, . . . , the interrogating party may file a written application for entry of final judgment for relief or dismissal. . . . . The application must be accompanied by a copy of the final request for answers and an affidavit containing the following information:

a. the date and manner in which interrogatories were served on the party against whom relief is sought;

b. the fact that the 45-day time period for service of answers or objections has expired, and no answers have been received;

c. the date and manner in which the final request for answers was served;

d. the fact that the 40-day time period for answers or objections after a final request for answers has expired, and that no answers or objections have been received; and

e. that the party now applies for final judgment for relief or dismissal.

(6) Entry of Judgment. Upon receipt of the application for final judgment and only if accompanied by a copy of the final request for answers and by the required affidavit as set forth above, the clerk shall enter an appropriate judgment, subject to the provisions of Rules 54(b), 54(c), 55(b)(1), 55(b)(2) (final sentence), 55(b)(4) (final sentence), 55(b)(6) and 55(c).

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No. 08-535

Supreme Court, U.S.
FILED
JAN - 2 2009
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IN THE
SUPREME COURT OF THE UNITED STATES

Chandrakant Pansé, *Petitioner*,

v.

Lindsay Norman, et al., *Respondents*

On Petition for Writ of Certiorari to
The United States Court of Appeals
for the First Circuit

Petition for Rehearing of Petition for Writ of Certiorari

Chandrakant Pansé, *J.D.*
MassBay College Biotechnology
50 Oakland Street
Wellesley Hills, MA 02481-5307
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QUESTIONS PRESENTED

I. Whether the constitutionally mandated pre-deprivation due process, for termination of protected property or liberty interests, stands denied absent an adequately unbiased hearing officer as a quasi-adjudicator.

II. Whether denial of timely post-deprivation due process upon termination of protected property and liberty interests is unconstitutional.

Parties

Narrowed from Petition for Certiorari

Chandrakant Pansé, *J.D.*,

Plaintiff-Appellant and Petitioner,

v.

Lindsay Norman,
Judith Gill,
Peter Tsaffaras, *Esq.*,
Andrew Scibelli, and
Haidee Morris, *Esq.*,
each personally,

Defendants-Appellees and Respondents

The petitioner is a tenured professor at a State College.

The all respondents were (and some still are) high State education officials at the time of their actions in this matter..

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STATEMENT OF THE CASE

THIS COURT SHOULD REHEAR THIS MATTER

The petitioner, Pansé, in the interest of avoiding gross injustice, respectfully requests a rehearing of two questions of law which are well-settled in this Court, because the holdings of the United States Court of Appeals for the First Circuit cannot be reconciled at all with clear and important precedents of this Court.

This petition is significantly narrower, and thus very different in scope, than the petition for certiorari, and requests only *stare decisis* as to the two questions presented here.

The petition for certiorari had presented somewhat detailed facts and had raised numerous questions, all of which Pansé believed in good faith to be highly compelling, regarding critical protections under the Due Process and Free Speech Clauses of the Constitution of the United States and federal civil rights laws. On most of these issues, this Court has issued clear decisions in the past.

In the petition for certiorari, Pansé believed in good faith that a review of application of decisions of this Court to the various facts in this case was warranted in this Court in view of the irreconcilability of the decisions in the First Circuit with those of this Court, and particularly in view of the severe harms inflicted on the petitioners due to raw abuses of governmental power here.

Pansé understands that this Court would be

quite concerned regarding the abilities of a fresh law school graduate to present the level of argument required in this Court, and thus the Court would be reluctant to expend the very limited resources of this Court even for such compelling issues.

Hence, Pansé eliminates the other petitioners and several respondents from the earlier petition, eliminates majority of the facts, eliminates all official capacity claims against State employees and arms of the State (asserted pursuant to a recent decision of this Court,) and eliminates the majority of the issues, and limits this request for a rehearing to only *stare decisis* for the first two of the questions presented earlier.

Pansé respectfully submits in good faith that oral argument on these issues should not be necessary, or no significant oral argument be called for, because the holdings of this Court on the two questions presented here are crystal clear, and it is equally clear that the rules followed in the First Circuit, with all due respect to the Court of Appeals for the Circuit, do not adhere to this Court's holdings.

Therefore, Pansé believes that this narrowing of the issues here would aid in speedy resolutions of the two questions presented here, and in uniform applications of important holdings of this Court.

Thus, this Court would avoid injustice to multiple public employees in the First Circuit, and avoid gross injustice to the petitioner, by requiring that the First Circuit, with all due respect to that Court, implement this Court's clear holdings on the two questions presented here.

ESSENTIAL FACTS

A more detailed version of the facts, with citations to the record below, appears in the petition for certiorari, at 2-11.

Pansé is a dedicated and exemplary teacher, and played a critical role in creation of a highly innovative and successful program in biotechnology education at a two-year State college. Towards that end, he has been outspoken on the issue of raising educational standards in such State schools.

This case arises from a deliberately prolonged deprivation of Pansé's protected employment until his reinstatement under Orders of an Arbitrator and a State court.

At the time of this deprivation, the respondents were under a written 34 C.F.R. § 100.7(e) civil rights warning to refrain from retaliation against, and intimidation of, Pansé. This warning had been issued in response to a complaint filed with the federal Department of Education by another professor.

Pansé and college officials were also in litigation, ongoing in State Superior Court at that very time of that deprivation, for the college officials' retaliation for Pansé's exercise of the Free Speech Clause, with a State court holding in place as a matter of law that Pansé's speech in question was indeed protected. Respondent Norman, then President of the college, had specifically told Pansé that Norman was displeased with Pansé's exercise of the protected speech and that Norman was watching Pansé.

Prior to any pre-deprivation process, Norman declared to respondent Gill that Norman was "taking action to terminate the employment of the two professors," one who had filed the civil rights complaint, the other being Pansé, both having cooperated fully with a federal investigation arising from that complaint. Norman then proceeded to terminate both the professors.

To terminate the protected employment of Pansé, Norman used as an excuse some concerns regarding one biotechnology research course taught by Pansé, although Pansé had taught many other courses regarding which there were no concerns at all.

At a pre-deprivation hearing, Norman denied Pansé's objection that Norman, as a party-opponent in the then ongoing litigation for retaliation, could not judge Pansé.

An arbitrator, and subsequently a State Superior Court, held that Pansé's termination appeared related to the ongoing litigation for retaliation of protected speech. The Arbitrator made an extraordinary finding that the respondents could not even subject Pansé to any discipline, "much less discharge" (but made no mention of the written civil rights warning to refrain from retaliation.)

Respondents Gill, Tsaffaras, and Morris caused extreme delays in the post-deprivation arbitration process, through tactics such as refusing to agree to any hearing dates for months at a time, prolonging the process for up to an extraordinary four years.

All respondents are very highly educated, experienced and knowledgeable individuals, and acted thoughtfully and in concert.

Respondent's actions caused the Pansé family extreme harms, as had been predicted and warned by this Court.

Pansé sued in the U.S. District Court (D. MA.) The Court dismissed most of the *pro se* complaint, for failure to state a claim, and the United States Court of Appeals for the First Circuit affirmed.[1]

The district court denied, in part, a motion for summary judgment, then granted the part denied earlier. The U.S. Court of Appeals for the First Circuit summarily dismissed a timely appeal, and then dismissed a motion to stay mandate.

On December 8, 2008, this Court denied a timely petition for certiorari.

Pansé now respectfully submits a highly curtailed petition, albeit with somewhat expanded quoting from this Court's decisions, requesting *stare decisis* only, for a rehearing as the only means to avoid extreme injustice to him and his children.

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[1] *Cf.*, *Boag* v. *MacDougall*, 454 U.S. 364, 365 (1982) (it is an error as a matter of law to dismiss a *pro se* complaint for failure to state a cause of action.)

I. THE CONSTITUTIONALLY MANDATED PRE-DEPRIVATION DUE PROCESS, FOR TERMINATION OF PROTECTED PROPERTY OR LIBERTY INTERESTS, STANDS DENIED ABSENT AN ADEQUATELY UNBIASED HEARING OFFICER AS A QUASI-ADJUDICATOR

Due process requires a constitutionally minimum pre-deprivation hearing for termination of a tenured public employee. *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532, 542 (1985).

This Court has held in a unanimous decision that "As this Court repeatedly has recognized, due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities" (emphasis added.) *Schweiker* v. *McClure*, 456 U.S. 188, 195 (1982), citing, as one example, *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 242 -243, and n. 2 (1980).

As for the rationale for this unequivocal demand for impartiality, i.e., for the requirement of lack of bias, on part of the hearing officer, this Court observed that "[T]o perform its high function in the best way, 'justice must satisfy the appearance of justice.' " *Schweiker*, 456 U.S. 195, citing *In re Murchison*, 349 U.S. 133, 136 (1955), which had quoted from *Offutt* v. *United States*, 348 U.S. 11, 14 (1954).

To be sure, there is a presumption that such hearing officers are unbiased, but "This presumption can be rebutted by a showing of conflict of interest or some other specific reason for disqualification." *Schweiker*, 456 U.S. 195 (citation omitted.) "[T]he

burden of establishing a disqualifying interest rests on the party making the assertion." *Id.*

This Court later explained, albeit somewhat indirectly, the requirement for the pre-deprivation hearing officer being unbiased: at any such hearing, this Court requires a "meaningful opportunity to invoke the discretion of the decisionmaker." *Loudermill*, 470 U.S. 543.

However, the United States Court of Appeals for the First Circuit applied an irreconcilable standard to the case at bar: *Chmielinski* v. *Mass. Office of the Comm'r of Prob.*, 513 F.3d 309, 318 (1st Cir. 2008) ("We have held that there is no requirement that the hearing officer be impartial.")

Pansé respectfully insists that the *Chmielinski* rule in the First Circuit cannot be reconciled with *Schweiker*'s requirement of impartiality, and therefore *Chmielinski* should be struck as plain error of law.

The Court of Appeals also denied the critical *Schweiker* right to rebut the presumption of impartiality, for Norman, as a party opponent in ongoing litigation for retaliation, could not possibly serve as an impartial hearing officer. Thus, Pansé was denied the *Loudermill* right of a meaningful opportunity to appeal to the discretion of the hearing officer. This constitutes further reason to strike *Chmielinski* as plain error of law.

(The Court of Appeals did hold that the lack of impartiality "does not itself determine whether bias can be so severe as to interfere with due process at the

hearing itself." *Chmielinski*, 513 F.3d 318.

Even under this standard, the pre-deprivation hearing officer, Norman, here should be seen as so severely biased, on account of being a party opponent in ongoing litigation for retaliation, that he could not possibly serve as the quasi-adjudicator. This provides an equally compelling reason, as a matter of fact, to hold that Panse was denied any pre-deprivation due process.)

This Court has observed that all these elements of the pre-deprivation due process are important, even where facts for termination of employment are clear: this Court has "frequently recognized the severity of depriving a person of the means of livelihood." *Id. See, also, FDIC* v. *Mallen*, 486 U.S. 230, 243 (1988) (same.)

This Court also found that the impact of wrongful termination "may be so devastating," causing such "traumatic disruptions," that the employee will "almost inevitably suffer irreparable injury" which "will never be recompensed." *Id.* at 549-550 (Marshall, J., concurring.)

Therefore, "By requiring the government to follow appropriate procedures when its agents decide to deprive any person of life, liberty, or property, the Due Process Clause promotes fairness in such decisions." *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986).

The government and the society also benefit by keeping the employee, *Loudermill*, 470 U.S. at 544, justifying "an initial check against mistaken

decisions," *id.* at 545. (Therefore, this Court does suggest an alternative to termination: suspending with pay, pending the more complete post-deprivation due process hearing. *Id.* at 544.)

The respondents here avoided any reasonable alternative, such as assigning Pansé to teach courses regarding which they had no concerns, particularly in a case so devoid of cause that the Arbitrator held that the State had no case at all.

Wherefore, this Court should conclude that the United States Court of Appeals for the First Circuit committed a plain error of law in its holding that the pre-deprivation hearing officer need not be impartial, and committed plain error of law in denying the right to rebut the presumption of impartiality of a hearing officer.

Wherefore, this Court should hold that Pansé, as a matter of law, was denied any pre-deprivation opportunity to be heard at all, and thus Pansé was denied his constitutional pre-deprivation due process guarantees.

Wherefore, this Court should reverse and remand for an application of *Schweiker* and *Loudermill* to the facts of this case.

II. DENIAL OF TIMELY POST-DEPRIVATION DUE PROCESS UPON TERMINATION OF PROTECTED PROPERTY AND LIBERTY INTERESTS IS UNCONSTITUTIONAL

This Court has been very clear in requiring prompt post-deprivation due process where the government terminates a citizen's protected interest.

"[T]he allegation of a distinct due process violation in the [post-deprivation] administrative delay is not an alternative theory supporting the same relief, but a separate claim altogether" (emphasis added.) *Loudermill*, 470 U.S. 547 n. 12.

This Court has "[E]mphasized that . . . account must be taken of the length . . . of the deprivation," *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982). Due process requires a hearing "at a meaningful time and in a meaningful manner," *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). At some point, a delay in the post-termination does become a constitutional violation. *Barry* v. *Barchi*, 443 U.S. 55, 66 (1979) (post-deprivation hearing followed only a few days after suspension.)

Promptness, or lack thereof, in post-deprivation due process must be considered. *Gilbert* v. *Homar*, 520 U.S. 924, 932 (1997). If a post-deprivation hearing is sufficiently prompt, then the lost income for an employee can be relatively insubstantial and health insurance may not be affected at all, limiting any undue harm to the employee. *Id.* (This Court did remand *Homar* for determination of damages from deprivation of a few days. *Id.*, at 936.)

However, even prompt post-deprivation process may not "make the employee economically whole again, and the wrongfully discharged employee will almost inevitably suffer irreparable injury." *Loudermill*, 470 U.S. 550 (Marshall, J., concurring.)

A 9-month long post-deprivation adjudication was not unconstitutional *per se* where there was only a conclusory claim that it took too long, without an allegation of a cause. *Loudermill*, 470 U.S. at 547. However, the Court plainly did "not state a flat rule that 9-month delays . . . will pass constitutional scrutiny as a matter of course." *Id.*, at 553 (Brennan, J., concurring in part and dissenting in part.)

Here, Pansé went three and a half years without his paycheck and back-pay, and almost four years without his family medical insurance. This was because the respondents deliberately stretched the post-hearing process to such extremes. This caused injuries to Pansé, harms so severe that they cannot ever be fully recompensed, just as had been predicted by this Court in *Loudermill*.

This Court should hold that the United States Court of Appeals for the First Circuit did not comply with *Barchi* and *Homar*, and thereby committed plain error of law, in holding that such extreme and deliberate delays as here can pass constitutional muster, and committed plain error of law in dismissing Pansé's *Loudermill* right of an altogether separate cause of action in the extreme and deliberate post-deprivation delay.

Therefore, this Court should reverse and remand.

CONCLUSION AND RELIEF SOUGHT

Petitioner Pansé demonstrates here that critical grounds exist for this Court to take the highly unusual action of rehearing a case. These grounds consist of plain errors of law, with all due respect to the Court, by a United States Court of Appeals, and the resulting severity of injustice.

Pansé suffered the injuries predicted by this Court in *Loudermill*, and suffered worse, as direct result of the actions of the respondents.

Pansé submits respectfully that the denial of his claims as a consequence of non-adherence to this Court's critical holdings in the First Circuit has resulted in gross injustice.

Wherefore, this Court should grant the rehearing requested, and find that the Court below, with all due respect to that Court, was in plain error of law by not adhering to the *Schweiker* requirement of impartiality of a pre-deprivation quasi-adjudicator, and in plain error of law in denying the *Schweiker* right to rebut the presumption of impartiality, and in plain error in denial of the *Loudermill* right to a claim for post-deprivation delay as a separate cause of action.

Wherefore, this Court should hold that Pansé was denied any procedural due process whatsoever, either pre-deprivation or post-deprivation.

Thus, this Court should avoid extreme injustice by granting the rehearing requested, and by granting this request to reverse and remand.

Respectfully submitted,

Chandrakant Pansé, *J.D.*
MassBay College
Biotechnology Program
50 Oakland Street
Wellesley Hills, MA 02481

RULE 44.2 CERTIFICATE OF COMPLIANCE

I hereby certify that this petition for rehearing complies with this Court's Rule 44.2.

I present this petition in good faith, and not for any delay.

The questions presented here are limited to those presented in the petition for certiorari. The petition presents quotations from decisions of this Court for critical grounds for this Court's consideration, and these were not previously presented, and these issues and quotations are of grave significance.

Respectfully submitted,

Chandrakant Pansé, *J.D.*